

THE TEXTUALITY OF THE CONSTITUTION AND THE ORIGINS OF ORIGINAL
INTENT

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THE TEXTUALITY OF THE CONSTITUTION AND THE ORIGINS OF ORIGINAL INTENT

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In this dissertation, I engage issues associated with the particular nature of the American Constitution, seeking why and how Americans have come so strongly to identify with the Constitution as a text, and with the framers of that document as authors of that text. This identification remains a central part of American political culture, placing limits upon what is ideologically permissible within the polity. Examining newspapers accounts, I trace the historical origins of the close association of the American Constitution with its “framers” – an idea that has currency through popular constitutional interpretation via “framer intent.” I locate the genesis of this idea within three ideational environments within the early American Republic. These are (1) the emergence of the Author figure as a method of ordering texts, (2) the veneration of the founders and their association with the Constitution, and (3) the divergence of legal and non-elite constitutional interpretations. Each of these developmental strands contributed in forming a constellation within which claims of framer intent could come to carry weight. The final component of the dissertation explores the culmination of these processes within the debates over abolition with the District of Columbia in the 1830s, and the resultant turn to constitutional understandings predicated upon beliefs as to the framers’ intentions rather than the text of the Constitution.

BIOGRAPHICAL SKETCH

The author was born in London, UK. He attended Edinburgh University, and graduated with a Master of Arts degree in Modern History and Politics in 2003. He subsequently completed a Master of Arts in United States Studies from the University of London in 2005. He began doctoral studies in Government at Cornell University in 2006. He received the Master of Arts degree from Cornell University in 2010. The following publication was a result of work conducted during doctoral study: “The Framers Themselves: Constitutional Authorship during the Ratification,” *American Political Thought* 2:1 (2013)

For my grandparents.

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Writing a list of acknowledgements for this project is difficult. The full list of debts is too great to commit to paper, but I hope to do at least the most important ones some justice here.

The debt of thanks that I owe to my dissertation committee is an important place to start. Collectively, they have assisted and supported me throughout this project and as a final product its strengths and successes are as much theirs as mine. Moreover, in each case their own work has framed my understanding of American history and its relationship to political thought. Without this, my own project would be significantly different. Their contribution reaches beyond the project itself however, for each member has been an important figure in my development as a scholar.

I came to Cornell after reading Isaac Kramnick's introduction to the *Federalist Papers*. He is the model of a democratic teacher and scholar. In the classroom, his willingness to ask students what they think and to discover political texts anew is both inspiring and humbling. But it is in his humanity in the broadest sense that his influence upon me has been profound. In demonstrating care for his students as people as well as scholars, for the institutions in which we inhabit, and for the role of the university in the community, he personifies the type of academic I would hope to become. He has taught us the lore of Cornell as no one else could, and encompass all the very best tendencies of the "heathens on the hill."

Jason Frank's infectious excitement for political theory was evident from the very first class I took with him. As he leapt from his chair in response to complex democratic theory, I wondered if there was not something I was missing – but at the same time wanted in on it! Over the course, and in the subsequent years, I have gained an ever deepening appreciation of democratic theory – and theory more generally – as he has pushed me to be a better political theorist. His willingness to continually nudge me towards more rigorous analysis has improved my work, as has his example as a scholar. I regularly turn to his work to see how he dealt with an issue, only to find it is inevitably with insight and clarity. As his roster of dissertation committees grows with every year, I will always be honored to have been the first that he co-chaired.

Elizabeth Sanders has taught me more about American politics than anyone else, to the point where I feel positively ignorant about my own nation's political life in comparison. Her knowledge of political history is breathtaking, and I leave every conversation with a mental note to look up that event or this person lest my ignorance shows next time. But it is her mentorship that has meant most to me. During the first year of the PhD I wondered whether I had the stuff of an academic, but it was her encouragement and faith that kept me going. I learnt a tremendous amount about American politics, but also about myself, in her survey course. Her generosity of time is a blessing for any mentee, and I owe no insignificant part of my dissertation funding to her willingness to edit the applications word-by-word.

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These comments do little justice to my committee's contribution, but I hope they give some flavor of the deep debts I owe them. Over the years, I have learnt the inside of their offices well – and for this I will always be grateful.

Beyond my committee, Cornell University has also afforded me opportunities and resources for which I am indebted. I was fortunate to be admitted alongside an incredible cohort, whose support, comradeship, and willingness to challenge each other helped us all. Alongside this cohort, other colleagues at Cornell have been instrumental in making it a great place to be a student. In no particular order, I particularly want to thank Jaimie Bleck, Michael Miller, Chris Casillas, Deondra Rose, Maria Sperandei, Pablo Yanguas, Don Leonard, Phillip Ayoub, Igor Logvinenko, Berk Esen, Simon Velasquez, Janice Gallagher, Benjamin Brake, Julie Ajinkya, Chris Zepeda-Millán, and Steve Nelson. The lack of a name does not denote a lack of thanks.

I've also been fortunate to be part of an amazing group of young political theorists while at Cornell. The Political Theory Workshop and the courses in the Department have been opportunities to learn from them, and have made me a better theorist. They have also heard my dissertation presented more times than can be good for an individual, and have continually offered important challenges and suggestions. It is a stronger work for it. I have also benefitted from socializing with such a group, which in the depths of an Ithaca winter cannot be overvalued. Again, in no order, I wish to particularly acknowledge Simon Cotton, Onur Ulas Ince, Sinja Graf, Nolan Bennett, Desmond Jagmohan, Michelle Smith, Vijay Phulwani, Sven Greune, Pinar Kemerli, Leila Ibrahim, Alison McQueen, Kyong Min Son, Murad Idris, and Aaron Gavin.

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This dissertation has spread beyond Cornell University and Ithaca, and so debts of gratitude are due further afield as well. For material support I am grateful to the Pennsylvania Historical Society, the Library Company of Philadelphia, the McNeil Center for Early American Studies, the Gilder-Lehrman Institute of American History, and the Institute for Political History. Access to historical sources has made this research possible, and so I am grateful to the New-York Historical Society, the New York Public Library, the American Philosophical Society, the Library Company of Philadelphia, the Pennsylvania Historical Society, and the University Libraries of Pennsylvania and Cornell for allowing me to make use of their special collections. It has been in their reading rooms that I have felt my closest connections with the feisty young American republic.

The time in Philadelphia also afforded me the privilege of spending a year in the company of some amazing young scholars and an environment that any researcher would relish. The McNeil Center for Early American Studies is an exceptional institute and one I am proud to have belonged to. I made great friends there and learned an incredible amount. I also presented the earliest chapter of the dissertation before a McNeil Center audience. They challenged me to think more about race: the final chapter's consideration of the abolition movement is in many ways the outcome of those challenges and I am grateful for that nudging.

I said that I would focus these acknowledgements on the dissertation itself, but a few more general thanks are in order. My parents have been supportive of my failure to secure gainful employment until well into my thirties – tolerance would be enough, but they managed to be proud of this as well. I was fortunate to have an incredible childhood, marked by two recurrent memories. The first is the question “what have we learnt from this?” – I hope that I have maintained the spirit of continual learning instilled in us. The second is long post-dinner conversations about current affairs and being tricked into watching the evening news. From this arose my interest in politics, and for that I will always be grateful. I owe my parents everything.

That they could be so supportive has much to do with my grandparents. That they committed to educating their children in the midst of an environment that made other choices easier, will always humble me. I wish they could have seen a grandchild complete a doctorate in the liberal arts. I wonder what they would have made of me, but I hope that I would have made them proud.

One person though has put up with me with the grace and tolerance of a saint. Pinar Kemerli has enriched my life in countless ways, and made me a better scholar and human being. She has read every draft of every chapter and always offered astute commentary, but also listened to

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There are many more people to thank, but I will leave it there, knowing that I can never list all my debts. I hope they can take some solace in the fact that the good parts of this dissertation are down to them. I take all the responsibility for the weaknesses.

Simon Gilhooley

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LIST OF ABBREVIATIONS

Debates *The Debates in the several State Conventions on the adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787... in Five Volumes.* Edited by Jonathan Elliot. New York: Burt Franklin. 1968.

DHRC digital *The Documentary History of the Ratification of the Constitution Digital Edition.* Edited by John P. Kaminski, Gaspare J. Saladino, Richard Leffler, Charles H. Schoenleber and Margaret A. Hogan. Charlottesville: University of Virginia Press. 2009.

<http://rotunda.upress.virginia.edu/founders/default.xqy?keys=RNCN-print&mode=TOC>

PJM digital *The Papers of James Madison Digital Edition.* Edited by J. C. A. Stagg. Charlottesville: University of Virginia Press, Rotunda. 2010.

<http://rotunda.upress.virginia.edu/founders/JSMN>

Introduction

In the final days of the 1787 Philadelphia Convention, as the delegates restlessly moved towards finalizing the document and returning home, the issue of its transmission to Congress and ultimately the state conventions came to a head. Franklin, partially breaking his aversion to public speech – he had James Wilson read his comments for him – offered a suggestion that the Convention’s members sign the new Constitution as an indication of the unanimity of the States.¹ While the unanimity Franklin sought would be undermined by the refusals of George Mason, Elbridge Gerry, and Governor Randolph to sign, the Convention voted unanimously as States for the measure, and those present signed the document that day. In signing, they sought to lend their collective personal prestige to the Constitutional project in order that it might more smoothly navigate the choppy waters of ratification, understanding “the vast majority & venerable names that would give sanction to its wisdom and its worth.”²

In putting their names to the document, the delegates of 1787 also marked the text as the product of their efforts, and it was for exactly this reason that the holdouts resisted. Both Randolph and Gerry articulated their reasons for refusing to sign in terms of personal association with the measures contained within the Constitution. Randolph insisted that his refusal should

¹ *The Records of the Federal Convention of 1787: Volume 2*, ed. Max Farrand, (New Haven: Yale University Press, 1961), 641-649. For a discussion of the questions raised in this short debate cf. Eric Slauter, *The State as a Work of Art: The Cultural Origins of the Constitution*, (Chicago: The University of Chicago Press, 2009), 5-7. For a recent discussion which argues that the act of signing operated to bind the Convention participants to the Constitution during Ratification and to lend their prestige to it cf. Michael Coenen, “The Significance of Signatures: Why the Framers Signed the Constitution and What They Meant by Doing So,” *Yale Law Journal* 119 (2010). On Franklin’s aversion to public speech cf. Larzer Ziff, *Writing in the New Nation: Prose, Print, and Politics in the Early United States*, (New Haven: Yale University Press, 1991): 101-104.

² *Records of the Federal Convention of 1787: Volume 2*, 644-645.

not be taken to indicate disenchantment with the Convention's project – rather he feared that the mechanism of ratification would undermine the objectives of the Constitution:

“...he did not mean by this refusal to decide that he should oppose the Constitution without doors... He refused to sign, because *he thought the object of the convention would be frustrated* by the alternative which it presented to the people. Nine States will fail to ratify the plan and confusion must ensue.”³

In light of this, he resisted “pledging himself to support the plan.” Gerry's opposition similarly focused on avoiding being bound to the substance of the Constitution, while supporting its broad aims. Given the political context, he felt

“it necessary... that the plan should have been proposed in a more mediating shape, in order to abate the heat and opposition of parties -- As it had been passed by the Convention, he was persuaded it would have a contrary effect -- He could not therefore *by signing the Constitution pledge himself to abide by it at all events*.”⁴

Nevertheless, while Gerry, Mason and Randolph resisted, the remainder of the Convention did sign the text perhaps fearing, in the words of Alexander Hamilton, that a “few characters of consequence, by opposing or even refusing to sign the Constitution, might do infinite mischief” to its prospects.⁵

Signing was, for at least Madison, Washington, and Hamilton, a political, not philosophical act. All three expressed displeasure with the Convention's outcome, but nonetheless “signed on” in order that some form of stronger federal government might be created. Given this, it seems unlikely that they would have wished that the Constitution would come to be regarded as an incarnation of their political views and values. Nonetheless, in signing, they would eventually take on the mantle of being the “fathers” of the Constitution,⁶

³ *Records of the Federal Convention of 1787: Volume 2*, 645. My emphasis.

⁴ *Records of the Federal Convention of 1787: Volume 2*, 647. My emphasis

⁵ *Records of the Federal Convention of 1787: Volume 2*, 645.

⁶ Leading one observer to “wonder whether, to the casual observer at least, the signatures contribute to a constitutional consciousness that is framer-heavy and people-lite—one that treats the Constitution as law

whose thematic intent and founding philosophy would be taken as a basis for interpretation of the textual document.⁷ In signing, they would become authors.

It is the inadvertent significance of this act with which this dissertation is concerned. I seek to locate the origins of the idea that framer intent ought to be a guiding principle of constitutional interpretation – that the intentions of those members of the 1787 Convention should shape the way we today, and throughout American history, understand the Constitution. I argue that the potential for framer intent was created from the confluence of three social developments within the early Republic. During the period between 1787 and 1840 three mutually supporting ideas gained popular acceptance and created an ideological⁸ environment in

that the framers imposed on us, rather than law that our society has imposed, and continues to impose, on itself.” Coenen, “The Significance of Signatures,” 1009.

⁷ Hamilton stated at the Convention that “no man’s ideas were more remote from the plan than his own.” *Records of the Federal Convention of 1787: Volume 2*, 645-646. Washington wrote to Benjamin Harrison after convention that the Constitution was “the best that could be obtained at this time” and remained hopeful that the amendment process might allow for its revision – if it had been not approved “anarchy would have ensued.” Quoted in Pauline Maier, *Ratification: The People Debate the Constitution, 1787-1788*, (New York: Simon & Schuster, 2010), 38. Madison expressed skepticism that the Constitution would even prove to be effective. On September 6th 1787 Madison wrote to Jefferson that if the Constitution were adopted it would “neither effectually *answer its national object* nor prevent the local *mischiefs* which every where *excite disgusts* ag[ain]st the *state governments*.” Quoted in Maier, *Ratification*, 36. Further evidence of a desire for distance between the Constitution and their own political philosophical views is provided by the reluctance of Hamilton and Madison to embrace the constitutional theories of *The Federalist Papers* afterwards. Cf. Douglass Adair, “The Authorship of the Disputed Federalist Papers,” *William & Mary Quarterly* 1 (1944): 100-102.

⁸ This dissertation sits at the crossroads of the subfields of Political theory and American Political Development both in its approach and its subject matter. Within each subfield the words “ideological” and “ideational” carry different meanings and significances. As I use them somewhat interchangeably in the dissertation and it behooves me to clarify the scope of these terms for this project at the outset. I understand “ideological” as something that pertains to the political idea structure of an individual or group of individuals. I do not in this instance associate it with a Marxian concept of class or group consciousness nor a partisan disposition of thought. By “ideational” I refer to the realm of ideas in contradistinction to materially or institutionally produced motivations. Under these definitions, ideology would reside in the ideational realm, although of course any distinction between institutions, material interests, and ideology must always be imperfect and an overly simplistic depiction of the interaction between them.

which framer intent could be mobilized to political ends. These ideas were (1) the emergence of the Author figure as a method of ordering texts, (2) the veneration of the founders and their association with the Constitution, and (3) the divergence of legal and non-elite constitutional interpretations. In the course of exploring these, I explore the competing claims of constitutional authority extant within the early Republic, and in doing so reflect upon the ways in which textual, spiritual, and institutional authority developed and was deployed around the Constitution.

The Constitution in America

The identification of the framers with the Constitution has become a commonplace basis of constitutional interpretation today.⁹ The marshaling of supportive framer rhetoric reaches across the partisan divide, and makes frequent appearance at the Supreme Court, despite the

⁹ While I intend to primarily examine the manner in which framer intent emerged, it perhaps behooves me here to set out my own position on framer intent. Acknowledging the important democratic mechanism by which it was the people (as ratifiers) that authorized the Constitution, I nonetheless concur with those that regard the stability (and so value of the document as a political constraint) as residing in a fictive authorial intent. In light of this fact, and in line with most constitutional scholars, I regard the critical intent to be that of the ratifiers, but do not believe a definitive or comprehensive account of this intent is possible. I remain deeply skeptical of claims that such intent can be more than broadly construed. The frailties of language, noted by James Madison at the time, make it unlikely that even the federal Convention shared more than a broad intent as to the text's meaning. But this frailty ought not be regarded as a weakness – it provides space, I think, for active consideration of and deliberation over the nature of the American polity. As Bonnie Honig has suggested, it is only through continual re-evaluation and argumentation that established rights remain vibrant. Too great a trust in the ability to recover the intent of the framers or ratifiers robs Americans of the necessary process of re-examining the basis of their institutions, replacing substantive commitment to the values associated with the document with a passive acceptance of filial inheritance. Further consideration of these issues is provided in the dissertation's conclusion. James Madison, "Number 37: Concerning The Difficulties Which The Convention Must Have Experienced In The Formation Of A Proper Plan" in *PJM digital*; Bonnie Honig, "Dead Rights, Live Futures: A Reply to Habermas's 'Constitutional Democracy,'" *Political Theory* 29 (2001).

public avowals of a commitment to “original meaning” rather than “framer intent.”¹⁰ The attempt to co-opt the support of the Constitution, and particularly the framers themselves, is of course not restricted to the realm of legal debate.¹¹ Wider political discussion is marked by appeals to the

¹⁰ As can be seen in the recent round of cases concerning the Second Amendment. The debates of *District of Columbia v. Heller* (2008) centered on the contrasting understandings of the drafters’ intentions. On one hand, Justice Stevens affirms “there is no indication that the Framers of the Amendment intended to enshrine the common-law right of self-defense in the Constitution... [Madison’s initial inclusion of an exemption] confirms an intent to describe a duty as well as a right” and Justice Breyer suggests that historical context indicates that the right could not have been intended as absolute. On the other, Justice Scalia presents veritable avalanche of contemporaneous dictionary definitions, usages, and practices to suggest that this was not indeed the case – that the Second Amendment protects an individual right. [554 US 570 (2008)]. Similar battle lines are drawn in the ensuing case of *McDonald v. City of Chicago*. In the latter, framer intent does much work, be it Justice Alito’s foray into ratification pamphlets to define the Second Amendment, Justice Breyer’s dissent that “historians [can not] find any convincing reason to believe that the Framers had something [other than a communal right] in mind”, or Justice Thomas’s citations of Madison and Hamilton to prove that “the founding generation generally did not consider many of the rights identified in these amendments as new entitlements, but as inalienable rights of all men.” [561 U.S. 3025 (2010)]. For further discussion on the distinction between framer intent and original meaning see below.

¹¹ It is certainly the case that the framers are invoked with less caution and qualification in the public sphere than in legal sphere more alert to the ratifiers important legitimizing role in the Constitution’s creation. For John Boehner this means that in invoking the Constitution to oppose healthcare reform, he “stand[s] here with our Founding Fathers.” This attitude is often expressed by conservative figures in terms of a desire to “return to” the Constitution, implicitly suggestive of a departure from the intent of the framers. Michele Bachmann’s congressional TEA Party caucus is motivated by a wish to draw “Members’ attention to the cries of everyday Americans who are asking for a return to the fundamental principles contained within our nation’s greatest document, the Constitution.” The signatories to the 2010 Mount Vernon Statement argue that “[t]he federal government today ignores the limits of the Constitution, which is increasingly dismissed as obsolete and irrelevant. ... The change we urgently need, a change consistent with the American ideal, is not movement away from but toward our founding principles.” More colloquially, Sarah Palin frames constitutional fidelity as opposition to change in general: “Is this what their ‘change’ is all about? I want to tell ‘em, nah, we’ll keep clinging to our “Boehner mixes up Constitution and Declaration,” *Politico*, November 5th, 2009.

http://www.politico.com/blogs/glennthrush/1109/Boehner_mixes_up_Constitution_and_Declaration.html Accessed August 14, 2011; *Tea Party Caucus Website*. <http://teapartycaucus-bachmann.house.gov/> Accessed October 19th, 2013; *Mount Vernon Statement*. <http://www.themountvernonstatement.com/> Accessed August 14, 2011; “Palin rips taxes with Boston tea partiers,” *NBC*, April 14th, 2010. http://www.msnbc.msn.com/id/36505968/ns/politics-more_politics/t/palin-rips-taxes-boston-tea-partiers/#.TkhEub9m2P4 Accessed August 14th, 2011.

framers as definitive authorities,¹² and recurrence to direct quotation from the preserved and revered papers of these “demi-gods” is itself a peculiar characteristic of American politics. The correct interpretation of the constitutional document has become almost synonymous with a correct understanding of the framer’s intended meaning as the authors of that document.

The response of the framers to their veneration as the actors behind the Constitution would probably have been somewhat conflicted. While Adair has shown that the founders were concerned with their place in history,¹³ their personal aggrandizement has surely distracted attention from what they regarded as their greatest achievement – the Constitution itself.¹⁴ Their

¹² Most notably perhaps in the debates surrounding the separation of church and state. Publications such as David Barton, *Separation of Church & State: What the Founders Meant*, (Aledo, TX: Wallbuilders Press, 2007) which show the founders support for Christian values have been countered by attempts to place these values within political context such as *The Separation of Church and State: Writings on a Fundamental Freedom by America's Founders*, ed. Forrest Church, (Boston: Beacon Press, 2004) and particularly Isaac Kramnick & R. Laurence Moore, *The Godless Constitution: A Moral Defense of the Secular State*, (London: W.W. Norton & Company, 2005). Within the legal sphere, the significance of the founders’ personal views for discussions of this issue is highlighted in *Everson v. Board of Education* in which the papers and letters of Madison and Jefferson are used to interpret the First Amendment guarantee of religious freedom. *Everson v. Board of Education* (330 U.S. 1 (1947)). Despite criticism of David Barton’s scholarship he remains influential cf. “Using History to Mold Ideas on the Right”, *New York Times*, May 4, 2011. Available at <http://www.nytimes.com/2011/05/05/us/politics/05barton.html>. Accessed June 17, 2011.

¹³ Adair’s discussion of the influence of Plutarch’s *Lives of the Noble Greeks and Romans* on the founding generation suggests that the Revolution widened the horizons of these men, reconfiguring their notions of ambition such that they sought a place in history as the founders of states. Interestingly, his essay suggests a divergence between Hamilton’s valuation of founding as a physical act and Jefferson’s as the creation of an enduring idea, an idea that somewhat reflects the two “bodies” of the Constitution discussed above. Douglass Adair, “Fame and the Founding Fathers” in Douglass Adair, *Fame and the Founding Fathers: Essays by Douglass Adair*, ed. Trevor Colbourn, (New York: W. W. Norton & Company, Inc., 1974).

¹⁴ Jefferson would write in 1789 that “[t]he constitution, too, which was the result of our [sic] deliberation, is unquestionably the wisest ever yet presented to men.” In February 1788, Rufus King would quote John Adams’s claim that “[t]he deliberate union of so great and various a people in such a place, is without all partiality or prejudice, if not the greatest exertion of human understanding, the greatest single effort of national deliberation that the world has ever seen.” Thomas Jefferson to David Humphreys, 18th March 1789 reproduced in *The Writings of Thomas Jefferson Memorial Edition: Volume 7*, eds. A. A. Lipscomb & A. E. Bergh, (Washington DC: Thomas Jefferson memorial association of the United States, 1903-04), 322; Rufus King to Theophilus Parsons, 20th February 1788 reproduced in Rufus King, *The life and correspondence of Rufus King: comprising his letters, private and official, his public documents, and his speeches, Volume 1*, (G. P. Putnam & Sons, 1894), 321.

rise has at the same time undermined the understanding of the Constitution which they advocated, and which they did so much to advance.¹⁵ Paine's account of a ceremony in which the Law is itself crowned King, before its authority is distributed amongst the people,¹⁶ vividly depicts the notion of a constitution strived for by those individuals. Seeking not to impose themselves upon the people, they instead sought to create a document that was the possession, and delegated authority, of all. In the final essay of *The Federalist Papers*, Hamilton would describe the establishment of the Constitution as the act of "a whole people,"¹⁷ while Madison emphasized the ratifying conventions as the "authoritative bodies that made it law," the mechanisms "through which the Nation made it its own Act."¹⁸ James Wilson, in remarks to the Pennsylvanian ratifying convention, drew attention to the preamble in arguing that:

"...the supreme power resides in the people. This Constitution, Mr. President, opens with a solemn and practical recognition of that principle: - "We, the *people of the United States* [...] do ordain and establish this Constitution for the United States of America." It is announced in *their* name – it receives its political existence from *their* authority: they ordain and establish."¹⁹

¹⁵ Levy has suggested that Madison's refusal to publish his notes of the Convention was motivated by a desire to ensure that it did not become regarded as the work of a select group of framers. Documenting Madison's interventions in the defense of the authority of the ratifying conventions, Levy argues that the "Father of the Constitution" was resolute in the belief that the Constitution ought to be regarded as the work of the people in such conventions. Leonard Levy, *Original Intent and the Framers' Constitution*, (Chicago: Ivan R. Dee, 1988), Chap. 1.

¹⁶ "But where says some is the king of America? I'll tell you Friend, he reigns above, and doth not make havoc of mankind like the Royal -- of Britain. Yet that we may not appear to be defective even in earthly honours, let a day be solemnly set apart for proclaiming the charter; let it be brought forth placed on the divine law, the word of God; let a crown be placed thereon, by which the world may know, that so far as we approve of monarchy, that in America THE LAW IS KING. For as in absolute governments the king is law, so in free countries the law *ought* to be king; and there ought to be no other. But lest any ill use should afterwards arise, let the crown at the conclusion of the ceremony be demolished, and scattered among the people whose right it is." Thomas Paine, "Common Sense" in Thomas Paine, *The Thomas Paine Reader*, eds. Michael Foot & Isaac Kramnick, (London: Penguin, 1987), 92.

¹⁷ "The establishment of a Constitution, in a time of profound peace, by the voluntary consent of a whole people, is a PRODIGY, to the completion of which I look forward with trembling anxiety" Alexander Hamilton, "Number 85: Conclusion" in James Madison, Alexander Hamilton, & John Jay, *The Federalist Papers*, ed. Isaac Kramnick, (London: Penguin, 1987), 487.

¹⁸ Quoted in Levy, *Original Intent and the Framers' Constitution*, 20.

¹⁹ James Wison, "Remarks of James Wilson in the Pennsylvania Convention to Ratify the Constitution of the United States, 1787," in James Wilson, *Collected Works of James Wilson: Volume One*, ed. Kermit L.

Beardian scholars would argue that behind such rhetoric lurked naked class interest,²⁰ but to accept their characterization only makes it all the more surprising that over time the trend has been away from the idea of the Constitution as based upon popular ownership and creation.²¹

To be sure, the founders of the American polity saw some degree of distance between the people and their governing institutions as a necessary part of constitutional rule. The Constitution would be a mechanism by which the people-as-authority would grant limited powers to a new government in order that the people-as-subjects could be protected.²² Had the people and the government been in identity, the passions of the population would have carried over into the government with ease – a possibility against which the framers were careful to guard. In *Federalist No. 27* Hamilton expressed confidence that the new constitutional arrangements would ensure that those representing the people in the Senate:

“will be less apt to be tainted by the spirit of faction, and more out of the reach of those occasional ill humors, or temporary prejudices and propensities, which in smaller societies frequently contaminate the public deliberations, beget injustice

Hall & Mark D. Hall, (Indianapolis: Liberty Fund, 2007), 193. Emphasis added. This attribution of a strong understanding of the people as authors of the constitutional document is echoed in the “Republican Revival” within legal studies. Arguing that it was the *intent* of those involved in the creation of the Constitution to establish a liberal republican form of government scholars such as Sunstein and Ackerman have emphasized the people’s role within legal interpretation. Cf. Scott D. Gerber, “The Republican Revival in American Constitutional Theory,” *Political Research Quarterly* 47 (December 1994); Cass R. Sunstein, “Beyond the Republican Revival,” *The Yale Law Review* 97 (July 1988); Bruce Ackerman, *We the People: Foundations*, (Cambridge, MA: The Belknap Press of Harvard University Press, 1991).

²⁰ Charles E. Beard, *An Economic Interpretation of the Constitution of the United States*, (New York: The Free Press, 1935).

²¹ If the Beardian materialist conception of the Constitution was accepted it would surely undermine, not enhance, the stature the constitutional document and its framers within these times of heightened criticism of class inequality. Indeed it was the intent of Beard and his followers in developing an economic interpretation of the Constitution to engender a willingness to subject the Constitution to criticism and ultimate reform on that very basis. It is also important to acknowledge that recent scholarship has sought to reinstate the people’s political agency within the early Republic.

²² For discussion of the two identities of the people cf. Edmund S. Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America*, (New York: W. W. Norton & Company, 1988). For the classic treatment of the monarchical basis of this idea cf. Ernst H. Kantorowicz, *The King’s Two Bodies: A Study in Medieval Political Theology*, (Princeton: Princeton University Press, 1997).

and oppression... and engender schemes which, though they gratify a momentary inclination or desire, terminate in general distress, dissatisfaction, and disgust.”²³

Elsewhere, Madison’s famous *Federalist No. 10* would make the argument for representation as refining the public views.²⁴ What was peculiarly significant about the foundation of Constitution in America was the belief that it could both create this distance and ensure it was not abused. The arrangement of institutions, the balancing of state and federal powers, and the origin of authority in popular election would ensure that the people were afforded the greatest scope of liberty possible under state authority. A deliberate act of “self-alienation,” the Constitution would simultaneously provide the people with the benefits of government and protection against its excesses.

However, the degree to which the Constitution has become removed from the people would surely surprise the actors of 1787-88. Pointing to the dialectical process by which the People and the Constitution relate, Anne Norton has noted that while the creation of a written constitution enabled the people to recognize themselves as such, it also held them captive to the authority of the moment of founding.²⁵ Even those who repudiate the founders are, to paraphrase Foucault’s comment on the Enlightenment, subjected to the “blackmail” of the Constitution, insofar as they define their own political identity within and against the Constitution as understood, but fail to recognize themselves as actors constructing the shared meaning of the

²³ Alexander Hamilton, “Number 27: The Subject Continued With The Same View” in James Madison, Alexander Hamilton, & John Jay, *The Federalist Papers*, ed. Isaac Kramnick, (London: Penguin, 1987), 202.

²⁴ James Madison, “Number 10: The Same Subject Continued” in *PJM digital*.

²⁵ Although to be sure Norton also highlights the manner in which the founders are themselves “conquered” by the subsequent generations that will come to define their project. Anne Norton, “Transubstantiation: The Dialectic of Constitutional Authority”, *The University of Chicago Law Review* 55 (1988), 460.

document.²⁶ Made whole by the Constitution, the American people are also bound by it – to draw upon Norton’s titular metaphor, the “flesh” was transubstantiated into the “word,” but the “word” in truly dialectical fashion is once more transubstantiated into “flesh.” Whereas the moment of alienation ought to have been an enabler of rule-by-the-People, it has instead resulted in the rule of the Constitution as the imperfectly articulated, disembodied will of a particular *instance* of the people. Instead of enabling democratic rule, it has constrained it.

This idea can be more fully drawn out by considering the oft-invoked quasi-religious character of the United States Constitution. Norton’s use of the theological concept of transubstantiation to talk about the Constitution echoes the common recourse to religious imagery whenever the document is under discussion. The Constitution is “worshipped,” “venerated,” and “revered.” Its existence is a “divine blessing,” its content “sacred,” and it remains America’s “Covenant.”²⁷ In linguistics if nothing else, Lincoln’s command that reverence for the law ought “become the *political religion* of the nation”²⁸ has been applied to the Constitution with relish. Given these echoes, it is not surprising that Ludwig Feuerbach’s understanding of religion parallels the relationship between the American people and their Constitution. Feuerbach argued that “[r]eligion, at least the Christian, is the relation of a man to himself, or more correctly to his own nature... but a relation to it, viewed as a nature apart from his own.”²⁹ In this way, Feuerbach argued that religion was the consequence of a process of self-alienation, through which the conditions of humanity were incarnated in an externalized form

²⁶ Norton, “Transubstantiation,” 467; Michel Foucault, “What is Enlightenment?” in Michel Foucault, *The Foucault Reader*, edit. Paul Rabinow, (New York: Pantheon Books, 1984), 45.

²⁷ For a broader discussion of the “religious” nature of the Constitution in the contemporary United States cf. Paul W. Kahn, “Sacrificial Nation,” *The Utopian March* 29th, 2010.

²⁸ Abraham Lincoln, “The Perpetuation of Our Political Institutions,” *Sangamo Journal*, February 3rd, 1838.

²⁹ Ludwig Feuerbach, *The Essence of Christianity*, trans. Marian Evans, (London: John Chapman, 1854), 13-14.

and then placed in confrontation with humanity itself.³⁰ Marx would characterize this process as one in which “the secular basis [of religion] detaches itself from itself and establishes itself in the clouds as an independent realm.”³¹

We can apply this idea to the Constitution to draw out the same possibility; that the enabling alienation of the people’s authority in order to better construct a democratic polity has the potential to constrain the politically possible to the parameters of that alienating act.³² More concretely, the Constitution can become the “First Cause” of American politics, containing within itself what is politically “moral” and defining through absence what is “immoral.” Such a scenario is in fact contained within Norton’s account: The Constitution was created by the people but has come to constrain them. Crucially, the gap between the people and their constitutional

³⁰ Feuerbach, *The Essence of Christianity*, 32-33. God exists as the antithesis of man (the divine vs. the human), but nonetheless represents man’s own latent higher nature – the perfection of reason, as the culmination of knowledge and the suppression of emotion. Man makes sense of his condition and enables intellectual development by abstracting from his character those elements he wishes to improve. Positing God as a divinely rational being, an individual can provide themselves with a basis for continually striving to act “as they should”, despite a human instinct to do otherwise. In Feuerbach’s example, the divine model enables a father to condemn his guilty son to death despite the paternal emotion involved in such an act. Reminiscent of the notion of self-binding associated with the people’s two bodies, Feuerbach’s example suggests that through the alienation, an individual can constrain their emotive, instantaneous self to act in their longer-term, rational interest – the contemplative people can check the aroused rabble.

But Feuerbach’s discussion of religion also highlights the dangers of such self-alienation. By abstracting one’s positive action and associating it with a divine entity, the individual also constructs a binding notion of what is correct behavior. The litany of discarded religions, now regarded as primitive or superstitious, suggests to Feuerbach that what was once regarded as divine has since become resolutely human (13). However, the temporary stability of these “primitive” religions attests that erroneous notions of reason held power for a time – that the continued striving for the human progress through divinity became overshadowed by the corresponding notion that what was conceived of as divine must be perfect. God ceased to be the abstraction of the latent potential of humanity, but became the divine First Cause. For a time, what God was believed to endorse was perfection by definition and human development stagnated as religion became the basis of as well as the spur for moral action. Here, the divine confronts the individual and constructs what is moral – constraining the moral development of the individual.

³¹ Karl Marx, “Theses on Feuerbach” in Karl Marx & Friedrich Engels, *The Marx-Engels Reader*, ed. Robert C. Tucker, (New York: W. W. Norton & Company, 1978), 144.

³² Although it is important to note that limiting the politically possible is the intention of any liberal democratic constitution. Cf. Stephen Holmes, *Passions & Constraints: On the Theory of Liberal Democracy*, (Chicago: The University of Chicago Press, 1995), Chap 4.

document, through which the two bodies of the people can be separated, has become alienating instead of liberating. The people-as-sovereign have ceded their authority to a Constitution, and instead of this process enabling the people to construct a democratic politics,³³ the consequence has been the constriction of the people's politics through the reification of the Constitution.

However the dissertation shows that this process was not a straight-forward elite transfer of authority from the people and to the framers. Instead, it was a complex and multifaceted development that was not driven by a group of elites alone, but rather emerged from interactions between the people and political elites, between the founding and second generations, and within the institutional setting of the judiciary and public acts of revolutionary remembrance “out of doors.”³⁴ It was as the requirements of a post-revolutionary generation merged with the institutional imperatives of the new Republic, against the backdrop of a print culture convulsed by the sparring of liberal and republican norms, that America would forge a relationship with its Constitution.

The development of framer intent

I argue, as was indicated above, that three developments form the foundation upon which framer intent could be discerned. Taking each in turn before showing how they operated together to forge a particular cultural conception of the Constitution, I will show that by the late 1830s the

³³ For the seminal account of this process in the American context cf. Michael Warner, *The Letters of the Republic: Publication and the Public Sphere in Eighteenth-Century America*, (Cambridge, MA: Harvard University Press, 1990). Warner's claim here is that the impersonal constitution provided a basis for the interpellation of the American people and their democratic authority.

³⁴ The complexity of this development required at least the full period of 1787-1837 to play out. As such this account challenges depictions which see the initial period of American constitutionalism lasting only until Jefferson's election. Cf. for example Terry Bouton, *Taming Democracy: "The People", the Founders, and the Troubled Ending of the American Revolution* (Oxford: Oxford University Press, 2007).

notion of the popularly-owned/impersonal Constitution had given way to a framer intent-orientated conception of the Constitution.

Examining first the relationship between what Foucault termed the Author function – the use of the authorial figure as a method of organizing and categorizing texts – and the Constitution, I argue that the emergence of the Author made possible the use of the framers intent as a hermeneutic technique.³⁵ Providing a basis for the idea of tying a product to a single actor or group and deriving its authority and value by way of this relationship, the Author function created a notion of the Constitution in which the framers’ relationship to the document was one characterized by textual authority. Highlighting, among others, Madison’s use of the Author function as a ratification strategy, I trace the unfolding of this idea in the legal commentaries of the early Republic, culminating in Justice Joseph Story’s reliance on *The Federalist Papers* and 1787 Convention records in order to forge a definitive comprehension of the Constitution.

³⁵ Michel Foucault, “What Is an Author?” 101-120. The ascription of texts to an author emerged in the transition to modernity, perhaps primarily, as Foucault suggested, as a means of holding individuals responsible for seditious writings. However, the acceleration of this process, and its ultimate legal codification, was a consequence of the emergence of a liberal political economy and the need to ascribe and enable the transfer of property in texts. For this reason the protagonists in the debates over authorship claims - and their legal existence as copyrights - were almost universally those with an economic interest in the printed texts. In England this meant a series of Eighteenth century legal disputes in which publishers sought to protect their monopoly over marketable texts under the guise of protecting authors. In America, similar debates saw authors such as Noah Webster and James Fenimore Cooper seek to insure they received adequate compensation from publishers and by extension the public for their “material.” Often couched in explicitly Lockean terms, the proprietorial claims of authors shaped contests over authorship such that economic concerns became the locus of debate. In Grantland Rice’s formulation, copyright debates at the end of the Eighteenth century saw “the private imperatives of individualism with its attendant ideology of sacrosanct ownership rights (e.g. Locke) [meet] with the public need for free commerce and circulation (e.g., Montesquieu).” While republican ideology offered a brake on the advancing liberal rights of the author, the structuring of the debate as between the individual and society inherently privileged a notion of ownership of ideas and of literary style that worked to valorize the creative individual and lay the foundations for the ultimate triumph of the liberal conception of authorship. Grantland S. Rice, *The Transformation of Authorship in America*, (Chicago: The University of Chicago Press, 1997), 78.

However, the association between the framers and the Constitution document would have remained a reified artifact of legal discourse had it not been for the increasing veneration of the founding generation and growing politicization and popularity of the Constitution during the period. I argue that these trends were not merely complementary to, but actually fundamentally linked to each other, and to the use of authorship as an organizing principle. With the passing away of the revolutionary generation, a second generation of Americans confronted the problems arising from locating the Revolution, and by extension themselves, within history. Faced with a need to find an historical role for themselves that did not threaten the revolutionary settlement, this second generation increasingly located the founders within a timeless mythology and came to understand their task as the second generation as one of institutional preservation.³⁶

³⁶ The problems faced by this generation echo to no small degree the interplay of “essentialism” and “epochalism” attributed by Geertz to all post-colonial societies, and the imperative of forging a nation from “American” society. Caught between the counter-metropolitan identification necessary for throwing off the colonizers (the essential) and the forward-looking centralization of identity necessary for nation-building (the epochal), Geertz argues that nascent societies erect nationalist ideologies through “images, metaphors, and rhetorical turns..., cultural devices designed to render one or another aspect of the broad process of collective self-redefinition explicit, to cast essentialist pride or epochalist hope into specific symbolic forms, where more than dimly felt, they can be described, developed, celebrated, and used” – and crucially to co-exist without overt friction. The political elites of the new American nation were deeply aware of the need to form a single nation from the disparate colonies, and worked to make real the fiction proclaimed in *Federalist No. 2* that America comprised:

“...one connected country... one united people – a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs....”

In this light, the mythologizing of the founders and Constitution reflects a process of nation-building, providing unifying symbols which harnessed epochal hopes to essentialist pride. For the post-revolutionary generation the figure of Washington worked to emphasize the world-historic significance of the revolutionary epoch, while creating an American heritage and identity that could inform essentialist claims. Indeed, for Washington’s most famous hagiographer, Parson Weems, the very significance of Washington’s story lay in its ability to shore up patriotic character – enabling him to prize didactic value over truth in his rendition of the felling of the cherry tree (amongst other tales). In a similar way, the Constitution could operate as a national symbol, signaling both America’s particularity and its world-historic importance. Clifford Geertz, “After the Revolution: The Fate of Nationalism in the New States” in Clifford Geertz, *The Interpretation of Cultures: Selected Essays*, (New York: Basic Books, Inc., 1973), 252; John Jay, “Number 2: Concerning Dangers From Foreign Force And Influence” in *The Federalist Papers*, ed. Isaac Kramnick, (London: Penguin Books, 1987), 91. On Weems cf. George B. Forgie, *Patricide in the House Divided: A Psychological Interpretation of Lincoln and His Age*, (New York: W. W. Norton & Company, 1979), 36-47. On the mobilization of the Constitution, see Jeremy Engels’s

Examining the orations made on the Fourth of July and compiling a database of the toasts offered during these celebrations, I trace an emerging discourse in which that generation's interpretation of history merged with a veneration of the founding generation, and lead to the close identification of the founding generation with the Constitution itself.³⁷ The result was that the American came to see the Constitution as a timeless document, both the product of a glorified group of individuals and the reason for their glorification.

The relationship between framer intent and the divergence of legal and non-elite constitutional interpretations is perhaps the most complicated of the three “legs” of the argument. The legal commentaries explored in reference to the framers' authorship of the Constitution demonstrate that a single, authoritative meaning was gradually attributed to the Philadelphia Convention's intent. Nonetheless, the institutional pressures faced by the Supreme Court led it to articulate a contrary understanding of the Constitution's authority. In the opinions of Chief Justice John Marshall, the people's authority was invoked to justify the Court's conflicts with the electorally responsive branches and the States. In these instances Marshall sought to frame the Court as the guardian of the people's Constitution in order to legitimize the nascent power of judicial review and by extension the Court itself. Perversely, the invocation of the people's originary authority was used by the Court to undermine the people's contemporary authority

interesting discussion of the use of the “Army of the Constitution” to suppress 1790s hinterland rebellion. Jeremy Engels, *Enemyship: Democracy and Counter-Revolution in the Early Republic*, (East Lansing, MI: Michigan State University Press, 2010).

³⁷ The interplay between (constitutional) text and national history calls to mind here Benedict Anderson's *Imagined Communities*, and particularly his analysis of post-colonial nationalisms in the Americas. The account echoes Anderson's insight that, in the absence of a unique national language, Americans turned to history and self-location within serial time as the “inheritors” of national independence in order to forge national identification. That the Constitution, a text, should be the vehicle of this identification, only reaffirms Anderson's view of the centrality of print-capitalism in creating the potential for the American colonial struggles. For the seminal account of the importance of a *printed* Constitution for this process see Michael Warner's work on this subject. Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, (New York: Verso, 2006); Warner, *The Letters of the Republic*.

over the Constitution, and to reserve interpretative authority to a cadre of judges and lawyers. Without overtly transferring authority to the framers, the Court did work to remove authority from the people. This institutional interest delayed court expressions of the legitimacy of framer intent as a method of legal interpretation. It also placed the judiciary on a different trajectory from that of the popular press as far as constitutional interpretation was concerned. Thus, despite significant evidence that the Constitution was popularly identified with the framers, the Court would resist that doctrine until the Twentieth century case of *Cooper v. Aaron* (with the important exception of the ill-fated *Dred Scott* decision).

Together these three developments fostered the potential for the emergence of framer intent as the prevailing mode of constitutional interpretation. This potential was actualized in the political debates of the 1830s regarding slavery. As defenders of slavery sought to respond to abolitionist attacks on the peculiar institution, they promoted an understanding of the Constitution as the sacred works of the framers. In doing so they aimed to make literal readings of the constitutional text illegitimate and to deny the abolitionists constitutional space within which to advocate for abolition in the District of Columbia. This mode of constitutional argumentation had developed sufficiently by 1836, that Martin Van Buren could exploit framer intent to side-step the sectionally divisive issue of slavery in the District of Columbia.³⁸ From the

³⁸ Delivering his Inaugural Address in 1837, Van Buren repeated the stance hammered out during his campaign;

"I must go into the Presidential chair the inflexible and uncompromising opponent of every attempt on the part of Congress to abolish slavery in the District of Columbia against the wishes of the slaveholding States, and also with a determination equally decided to resist the slightest interference with it in the States where it exists.' These opinions have been adopted in the firm belief that they are in accordance with the spirit that actuated the venerated fathers of the Republic... *For myself, therefore, I desire to declare that the principle that will govern me in the high duty to which my country calls me is a strict adherence to the letter and spirit of the Constitution as it was designed by those who framed it.*" (My emphasis).

mid-Antebellum period, American politics would be constrained for better or worse by a notion of the national Constitution underpinned by ideas of framer intent.

Scholarly Framework

The dissertation's research builds upon the vast academic literature concerned with the Constitution. A brief historiography of efforts to understand the founding shows that at least since the Progressive Era, the Whiggish account of the Constitution's creation as the culmination of the Revolution has been vigorously challenged. With the twin blows of Sydney Fisher's commitment to knocking the founders from their pedestals³⁹ and Charles Beard's *Economic Interpretation of the Constitution*,⁴⁰ the narrative that framed the Constitution as a triumph of liberal democracy was, if not overturned, at least considered worthy of academic scrutiny. While Beard's analysis would be questioned⁴¹ and the Cold War *mentalité* would do much to undo Fisher's arguments,⁴² the notion that the historical meaning of the Constitution was sacrosanct was firmly put to rest. Though the Progressives had cleared the ground, it would be with the New Left scholars of the 1960s and the Revolutionary bicentennials of the 1970s that extended academic debate would emerge. Bernard Bailyn's seminal work argued that the Revolution

Martin Van Buren, "Inaugural Address", (March 4, 1837). Available at <http://millercenter.org/scripps/archive/speeches/detail/3486>. Accessed June 9, 2011.

³⁹ See for example Sydney G. Fisher, "The Legendary and Myth-Making Process in Histories of the American Revolution", *Proceedings of the American Philosophical Society* 51 (1912).

⁴⁰ Beard, *An Economic Interpretation of the Constitution of the United States*.

⁴¹ Forrest McDonald, *We the People: The Economic Origins of the Constitution*, (Chicago: University of Chicago Press, 1958); Robert E. Brown, *Reinterpretation of the Formation of the American Constitution*, (Boston: Boston University Press, 1963). For a thorough account of the historiography of the Revolution and Founding cf. Alan Gibson, *Interpreting the Founding: Guide to the Enduring Debates over the Origins and Foundations of the American Republic*, (Lawrence, KS: University Press of Kansas, 2006). Much of the following discussion is informed by Gibson's account.

⁴² Not least in the title of Catherine Drinker-Bowen's account of the Convention – *The Miracle at Philadelphia*, (Boston: Brown, Little and Company, 1966).

should be understood as the result of an ideological disposition labeled the “republican synthesis,” representing a complex of five theoretical strands drawn from classical antiquity, the Enlightenment, English common law, New England Puritanism, and the radical Whig thought of the English Civil War.⁴³ Bailyn was careful to place this ideology within the material context of the colonies, but his followers and opponents have underplayed this vital qualification to such an extent of polarization that ideological and economic accounts often speak past, rather than to, each other.⁴⁴ As economic accounts of the revolutionary period lost favor among scholars, a new line of polarization emerged, once again motivated by Bailyn’s intervention.

In the 1980s and 1990s scholarly discussion focused upon whether the disposition of the revolutionaries was republican or liberal, and by extension whether the Constitution represented a liberal ethos, republican ethos, or a liberal reaction to a republican revolution.⁴⁵ This debate

⁴³ Bernard Bailyn, *The Ideological Origins of the American Revolution*, (Cambridge, MA: The Belknap Press of the Harvard University Press, 1967); Bernard Bailyn, “The Central Themes of the American Revolution: An Interpretation” in *Essays on the American Revolution*, ed. Stephen G. Kutz & James H. Hutson, (New York: W. W. Norton & Company, Inc., 1973). Lutz offers an account of Bailyn’s significance at the beginning of his assessment of the importance of different strands of thought to the Revolution. Donald S. Lutz, “The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought,” *American Political Science Review* 78 (1984), 189.

⁴⁴ Cf. Bailyn, “The Central Themes of the American Revolution”, 10-14; Lance Banning, *The Jeffersonian Persuasion: Evolution of a Party Ideology*, (Ithaca: Cornell University Press, 1978). In part, of course, the marginalization of economic factors was a methodological necessity of what became the “Republican school.” Suggesting the ideology operated as a system of ideas through which material life was filtered, the advocates of the republican interpretation questioned realists’ claims that economic factors could have a direct influence on political thought. Cf. Linda K. Kerber, “The Republican Ideology of the Revolutionary Generation,” *American Quarterly* 37 (1985). Nevertheless, a limited focus on material conditions has constrained the potential influence of the republican approach. As Alan Gibson has noted, the endurance of the Beardian interpretation lies in part in the fact that it is “one of the few approaches that relies extensively on empirical analysis. As such, it remains an essential balance to the ideological interpretations of the American Revolution and the formation of the Constitution that have dominated scholarship....” Gibson, *Interpreting the Founding*, 87-88. Woody Holton has even suggested that Beard’s account of economic motivations may have stood the test of time even if the data has been criticized. Woody Holton, “Lionizing the Beard,” *Commonplace* 2 (July 2002). Available at <http://www.common-place.org/vol-02/no-04/reviews/holton.shtml>. Accessed July 14, 2011.

⁴⁵ Joyce Appleby, “Republicanism in Old and New Contexts,” *William and Mary Quarterly* 43 (1986); Isaac Kramnick, “Republican Revisionism Revisited,” *American Historical Review* 87 (1982); John P. Diggins, *The Lost Soul of American Politics*, (Chicago: University of Chicago Press, 1986); Lance

reached its conclusion in the observation that no single tradition (and certainly not the dichotomy of liberal-republican)⁴⁶ could adequately account for revolutionary *mentalité* – an observation that had been an implicit assumption of Bailyn’s use of a synthetic account of ideology.

The dissertation stands upon the shoulders of these great debates, but looks beyond them.⁴⁷ In line with more recent constitutional scholarship it does not seek to directly characterize, or periodize, the founding in liberal or republican terms.⁴⁸ As James Otis’ invocation of “life, liberty, and property,” and Jefferson’s Declaration of Independence attest, Lockean liberalism was current at the outset of the Revolution. Equally, the Jacksonian valorization of the people and the founder’s Constitution indicate that civic republicanism did not give way with the arrival of a market society. Instead, the ideologies of republicanism and liberalism that political theorists shed much ink to differentiate ebbed and flowed, and enveloped each other within the early Republic. It was within this fluid ideological environment that a framer-orientated conception of the Constitution emerged, but it was not a process that was tied to liberalism’s or republicanism’s relative strength. Nonetheless, evidence regarding authorship, in the practice of toasting, and the assumptions of a virtuous founding locate the dissertation’s discussion within a broad transition from republican to liberal attitudes. Republicanism also

Banning, “Jeffersonian Ideology Revisited: Liberal and Classical Ideas in the New American Republic,” *William and Mary Quarterly* 42 (1987). Many of the republican accounts make use of the work of Pocock and Rahe as a basis. J. G. A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republic Tradition*, (Princeton: Princeton University Press, 1975); Paul Rahe, *Republics Ancient and Modern: Classical Republicanism and the American Revolution*, (Chapel Hill, NC: University of North Carolina Press, 1992).

⁴⁶ Gordon S. Wood, “Ideology and the Origins of Liberal America,” *William and Mary Quarterly* 44 (1987); James T. Kloppenberg, “The Virtues of Liberalism: Christianity, Republicanism, and Ethics in Early American Political Discourse,” *The Journal of American History* 74 (1987); Alan Gibson, “Ancients, Moderns, and Americans: The Republicanism-Liberalism Debate Revisited,” *History of Political Thought* 21 (2000).

⁴⁷ Which certainly should not be taken to mean its had pretensions to see *further* than the canonical scholars involved in them.

⁴⁸ For an important recent account of the Constitution which bypasses liberal and republican debates cf. Slauter, *The State as a Work of Art*.

looms large in the account of the elevation of the founders. As the second generation of Americans sought to make sense of their Constitution, they drew on, and were shaped by, emerging ideological constructs – authorship, judicial supremacy, the revolutionary myth – in order to situate the document within their shared national consciousness. In doing so they made use of the republican “grammar” of founding moments to shape their own discourse regarding the American founding. The result, though, was not a classically liberal or republican understanding of the Constitution, but rather to a Constitution tied to its framers and engendering a political culture in which America became constrained rather than liberated by its founding.

In a similar way, while the argument offered by the dissertation shapes the development of framer intent as somewhat inevitable given the ideological structures of the early Republic, it is not to be understood as relentlessly “progressive” in its development. I show that the Constitution of 1787 was not that of 1800, and the Constitution of 1837 was perhaps even further removed from that of 1800 than 1787. I argue that the legacy of the Constitution was not set in the heat of the founding period, but forged in the warm afterglow of the National period (defined here as approximately 1790-1830). “Forged” here provides a useful metaphor, in the sense of shifting from a flexible and malleable institution to one that would become rigid and durable, but as also, in the longer term, suggestive of an eventual period of brittleness and rust.

My argument leads me to take a position on the question of institutional influence. It reflects and evinces the importance of ideas as the currency of political culture. I hope to show that the Constitution is in the final analysis a constructive institution, as Madison’s famous allusion to parchment barriers suggested. The extent to which the Constitution guides and shapes American political culture rests upon a shared, if often fraught, understanding of what the Constitution allows for and forbids. The power and durability of this construct is remarkable

when it is considered that the Constitution has survived more than two hundred years, countless wars, major social movements and accompanying reform, and the vast expansion of the federal government. That the document has remained a constraint on the actions of individuals for this length of time, supported by significant force only during the period of the Civil War and Reconstruction, is a testament to the institutional power of shared ideas.

But my commitment to the political importance of ideas is not only at the level of the Constitution. I also want to show that the Constitution as it ultimately emerged is itself the product of an interaction of ideas. The model of constitutional development used here takes seriously the claims of constructivist institutionalism. It follows the belief that ideas can “become codified, serving as ideational lenses through which actors come to interpret environmental signals.”⁴⁹ I would argue for the emergence of authorship, judicial review, and the veneration of the founders as processes by which ideas became codified cognitive filters. To take the Fourth of July orations as an example, the emergence of particular norms for composing these speeches can be seen as a codification of the ideational orientation of the second generation of Americans to their own history. Creating a cognitive filter, this narrative created norms of political behavior (fidelity to the Constitution) against which actors were measured. And authorship can be seen as an increasingly codified (copyright) norm that organizes the interpretation of textual content (the Author function). It was only through the emergence and consolidation of these ideas that

⁴⁹ Colin Hay, “Constructivist Institutionalism” in *The Oxford Handbook of Political Institutions*, ed. R.A.W. Rhodes, Sarah A. Binder & Bert A. Rockman, (Oxford: Oxford University Press, 2006), 65. See Hay’s essay for a full account of the constructivist institutionalist school.

the final construction of the Constitution as framer-produced/intended could develop. At its heart, this is an argument for the importance of ideas within American political development.⁵⁰

The dissertation's argument places particular emphasis upon the *interaction* of the three ideational developments incorporated within it. This interaction is a reflection of a particular social and material context and the need to respond to the requirements of each as it developed. Authorship as a concept emerged over the *longue durée* but was consolidating by the beginning of the nineteenth century. Judicial Review had a weak history in the common law, but was far from the norm of British jurisprudence, and became pressing only once the notion of constitutionalizing the polity at a particular moment became current. And the veneration of the founders as an act emerged from the interplay between first and second generations. That each ideational disposition came into being at the same moment, as a result of material considerations, and found partial succor in the others was central to the potential for framer intent. It is also a consideration when meditating on the particular "American-ness" of framer intention, given the wide array of countries claiming a written constitution. In offering a model of institutional development structured this way, I reaffirm the political importance of ideas and the significance of ideational orientations as *elements of* the social and material context within which institutional development occurs. That is to say, ideas are "things."

I also want to address the academic debates surrounding the idea of the democratic founding within democratic theory. Work in political theory has highlighted the conceptual

⁵⁰ For examples of such work cf. Robert C. Lieberman, "Ideas, Institutions, and Political Order: Explaining Political Change," *American Political Science Review* 96 (2002); Rogers M. Smith, "Beyond Tocqueville, Myrdal, and Hartz: The Multiple Traditions in America," *American Political Science Review* 87 (1993); James Morone, *Hellfire Nation: The Politics of Sin in American History* (New Haven, CT: Yale University Press, 2003).

problems presented by the act of creating a democratic polity prior to the emergence of a people to consent to it.⁵¹ This literature points to the necessarily undemocratic beginnings of all democratic polities, and seeks to theorize the consequences of and responses to this paradox. In the canonical discussion of this issue, Rousseau reverts in *The Social Contract* to the figure of the Lawgiver or Legislator as an extralegal authority.⁵² This figure creates for the democratic polity a set of rules through which the democratic will of the people might be addressed. Necessarily extralegal – they predate the ability of the people to articulate consent, or even to exist as a coherent entity – Rousseau looks to authority outside of the democratic institutions created for their support. But as Madison noted in *Federalist No. 40*, in attempting to address the question of whether the “convention were authorized to frame and propose this mixed Constitution,” neither religion nor force were satisfactory supports for the project of American democracy.⁵³ Madison concluded that the creation of the American polity necessitated that it be “instituted by some *informal and unauthorized propositions*, made by some patriotic and respectable citizen or number of citizens,”⁵⁴ but that crucially, and necessarily, in the last

⁵¹ For a flavor of these discussions cf. Jürgen Habermas & William Rehg, “Constitutional Democracy: A Paradoxical Union of Contradictory Principles?” *Political Theory* 29 (2001); Alessandro Ferrara, “Of Boats and Principles: Reflections on Habermas’s ‘Constitutional Democracy,’” *Political Theory* 29 (2001); Honig, “Dead Rights, Live Futures”; Bernard Yack, “Popular Sovereignty and Nationalism,” *Political Theory* 29 (Aug. 2001); Frank I. Michelman, “How Can The People Ever Make The Laws? A Critique of Deliberative Democracy,” in James Bohman & William Rehg, eds., *Deliberative Democracy: Essays on Reason and Politics*, (Boston: The MIT Press, 1997).

⁵² Cf. Rousseau’s discussion of the Lawgiver in Book II, Chapter 7 of *On the Social Contract*. Jean-Jacques Rousseau, “On the Social Contract” in Jean-Jacques Rousseau, *The Basic Political Writings*, trans. Donald A. Gress with intro. Peter Gray, (Indianapolis: Hackett Publishing Company, 1987).

⁵³ James Madison, “Number 40: The Same Objection Further Examined” in *PJM digital*. Although Madison did invoke the Almighty to support the work of the Convention of 1787: “It is impossible for the man of pious reflection not to perceive in it [the success of the Philadelphia Convention in fulfilling its task] a finger of the Almighty hand which has been so frequently and signally extended to our relief in the critical stages of the revolution.” Madison, “Number 37.” However it is worth noting that this invocation of divine authority is refracted through the Convention as drafters.

⁵⁴ Madison, “Number 40.” Original emphasis. For a detailed discussion of this cf. Jason Frank, ““Unauthorized Propositions” The Federalist Papers and Constituent Power,” *diacritics* 37 (2007): 103-120.

instance, the people would affirm or reject those propositions. Accepting the inevitability of the extralegal beginnings of the polity, Madison nonetheless sought to build upon the existing democratic communities – the States – in order to provide retroactive consent to the initial extralegal moment of creation.

In shunning resort to force and religion during the ratification process of 1787-88, Madison widened the potential forms of founding legitimation to include authorship. Invoking the absolutism of the Author with regard to their text, Madison's use of framer intent in 1788 highlights both the inescapability and subtlety of the democratic paradox. Madison's move underlines the need for an absolute in the creation of a democracy, and also shows that the absolute need not be force or divinity but could be drawn from the authority an author had come to wield over their text. This conclusion offers a counterpoint to Michael Warner's claim that it was the *lack* of an identifiable author is what enabled the Constitution to succeed in the early Republic.⁵⁵

The rise of framer intent also challenges the positive account of the limited nature of democratic foundings offered by Habermas. Habermas argues for the ability of absolutist democratic foundings to be "tapped" on future occasions in order that the polity might come to better approximate its democratic claims.⁵⁶ Progressive constitutional theorists have in different ways sought to encourage such tapping. In differing accounts, both Larry Kramer and Bruce Ackerman have sought to emphasize practices of popular constitutional ownership within the founding era as a basis for reinvigorating American democracy.⁵⁷ Depicting judicial review as a

⁵⁵ Warner, *The Letters of the Republic*.

⁵⁶ Habermas, "Constitutional Democracy"

⁵⁷ Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review*, (Oxford: Oxford University Press, 2004); Bruce Ackerman, *We The People: Foundations*.

facet of the constitutional theory of “departmentalism” – in which each branch has a co-equal interpretative authority, all subject to intervention by the people themselves – Kramer links the early Republic with the present insofar as “efforts to define a role for courts have been part of a larger and more fundamental struggle to maintain the authority of ordinary citizens over their Constitution.”⁵⁸ Likewise, in his three volume work *We The People*, Ackerman has argued for an understanding of American constitutional history in which each of three acts (Founding, Reconstruction, and the New Deal)⁵⁹ represent moments of higher law making by the people, establishing a new constitutional order that frames the following period of political self-government. In that narrative, the founding period forms the basis for the later moments of popular constitutional intervention.

But, for as many times as this may have occurred in American history, I argue that a reversed interaction can also be seen – the present has been “tapped” by a reified past, draining off its democratic exuberance in a way that retards the expansion of democratic values and limit the scope of political action. For although Madison’s temporary invocation of authorship explicitly did not intend to bind the American polity to the absolutism of the framers, the “intention of the framers” has become a constructive constraint on subsequent generations. When the Supreme Court argues about what was meant by the “right to bear arms,” it is not a radical unfolding of the ethos of ratification that is taking place, but a narrowing of the policy possibilities within an existing democratic polity. And as the recent rise of the TEA Party has

⁵⁸ Kramer, *The People Themselves*, 7. Barry Friedman has offered a similarly optimistic account of the constitutional court’s development in Barry Friedman, *The Will of the People*, (New York: Farrar, Straus and Giroux, 2009).

⁵⁹ Subsequently Ackerman has added a fourth, the Civil Rights Movement.

shown, pleas for constitutional fidelity often work not to expand the democratic community but rather to restrict and protest its growth.⁶⁰

Moreover, these accounts have left underexplored the possibility that notions of original intent emerged earlier – and that they might have emerged with the support of the people, rather than despite them. Asserting an originary popular ownership of the document in contradistinction to the later framer-orientated understandings, both Kramer and Ackerman overlook the impact that concepts of authorship could, when combined with the republican valuation of foundings, have in creating a prevailing – and crucially, popularly supported – understanding of the document in terms of framer intent. The decline of the people’s interpretative authority was key to the emergence of the alienated relationship that the American people have with their Constitution. But juxtaposing the people and the framers obscures the people’s complicity in the increased authority of the framers. As the Fourth of July celebrations explored in the dissertation show, the people themselves were active in the process of mythologizing the founders.

In offering a model of constitution development which engages with this literature, I hope to show that it was only through the interaction of ideas within the Early Republic that a constellation providing for framer intent came into being. And moreover, that it was only in the extended aftermath of the Constitution – and with the participation of the people themselves – that the democratic impulse of ratification was undermined by a constitutional calcification around the idea of framer intent.

⁶⁰ The TEA Party movement has mixed profound reverence for the Constitution with deep fear of immigrants, Muslims, and others deemed to lack appropriate American-ness. Theda Skocpol & Vanessa Williamson, *The Tea Party and the Remaking of Republican Conservatism*, (Oxford: Oxford University Press, 2012).

Chapter 1: Interpreting The American Constitution: The changing popular understanding of the Constitution

*“The Constitution of the United States – May its errors be calmly discussed, and peaceably amended.”*⁶¹

The introduction has outlined the argument of the dissertation and presented a map of the manner in which it will attempt to explore how the people’s relationship with the Constitution transformed in the first decades of the American Republic. However, without evidence that understandings of constitutional authority did indeed transition during this period, the argument of the dissertation is a solution in search of a problem. If the understandings of the Constitution expressed in print between 1787 and 1837 remained stable, then there is no need to detail the “constellation” that enabled ideas of framer intention to emerge as significant by the end of the time frame under examination. It is the intention of this chapter to offer a brief sketch of constitutional interpretation at four moments during the early Republic. These moments indicate that the popular understanding of the Constitution rapidly changed over the first decades of its existence, towards a social understanding of the Constitution which tied it closely to those actively engaged in its creation. By examining the newspaper debates at these crucial points of constitutional debate, it can be shown that the arguments marshaled by correspondents to these newspapers progress over time and can illustrate the emergence of a conception of “framer intent” within popular discourse.

The four moments examined are (1) the debate over the establishment of a national bank in 1790-91; (2) the electoral crisis of 1800-01; (3) the debate surrounding the renewal of the Bank’s charter in 1810-11; and (4) the Missouri Crisis. Newspaper correspondents between 1790

⁶¹ Toast at Republican festival, Petersburg, 29th January 1801. “Republican Festival,” *The National Intelligencer and Washington Advertiser*, February 9th 1801.

and 1820 track the changing norms of constitutional exchange from arguments grounded firmly in printed text and towards an association between constitutional meaning and the intention of the framers. By 1810-11 the rhetoric of intention is inescapable within popular constitutional debate, manifesting the collapse of the conceptual distinction between textual meaning and the intention of the actors responsible for the constitutional text. A decade later in 1819-20, the association of the founders with the constitutional text meant that its preservation was a broadly accepted ideal. In such an environment, modes of constitutional interpretation moved from examinations of the text-alone as authoritative and towards the view that the text was evidence of the anticipated meanings of the actors in 1787-88. This shift can be given concreteness by the manner in which actors in 1819-20 were willing to call upon historical context and to place themselves in the minds of the founders in order to derive constitutional meanings. Such actions are in marked contrast to the rejection of framer intent as a basis for deriving constitutional meaning in 1790-91 and the willingness in 1800-01 to give the people the power to construct constitutional meanings in real time. This survey shows that while framer intent was not the “original understanding” of the Constitution, by as early as 1810 it was a crucial concept within popular constitutional debate and by 1820 a central assumption.

In order to assess how interpretation of the Constitution was shifting over this thirty-year period, the America’s Historical Newspapers database (produced by Readex) was used. Using the search function to identify articles related to the words “Bank,” “Election,” “Bank,” and “Missouri,” and “Constitution,” respectively for four month periods centered on the event in question (or for the six months 11/1800 – 4/1801 given the drawn out nature of Jefferson’s election), the top 100 returns were sifted to identify articles with a bearing on the question of constitutional interpretation. From close reading of these articles a sense of the different

positions taken within the print debates was formed and is reproduced in the form of qualitative analysis below. While the incomplete nature of the database means that some significant newspapers were unavailable for each period, it is believed that this will not hinder the attempt to understand the nature of and assumptions present in each debate. Moreover, the use of secondary sources to identify exchanges deemed significant by others has not led to suspicions that the above approach misrepresents the tenor of each period of constitutional debate.

The First Bank, 1790-91

As David Currie has extensively documented, the first Congress was by no means able to assume control of a fully functional constitutional order as a consequence of the passage of the Constitution.⁶² A slender and sparing document, the Constitution as drawn up in Philadelphia left much detail to be filled out by those first charged with legislating and governing under it. Moreover, much of this work was carried out in the first decade of the federal government not by the Supreme Court, but by the Legislature and the Executive. Regarding the constitutional importance of the first decade of the federal government, Currie comments that:

“a number of constitutional issues of the first importance have *never* been resolved by judges; what we know of their solution we owe to the legislative and executive branches, whose interpretations have established traditions almost as hallowed in some cases as the Constitution itself.”⁶³

Among such weighty constitutional issues, the chartering of the first National Bank of the United States loomed large, generating debate on the floor of Congress and beyond. The Bank formed a key component of Hamilton’s economic program and as such was a polarizing issue for the

⁶² David P. Currie, *The Constitution in Congress: The Federalist Period 1789-1801* (Chicago: The University of Chicago Press, 1997).

⁶³ Currie, *The Constitution in Congress*, x.

nascent party groupings within the federal government. Opposed by Madison and Jefferson, the Bank would become established only after Washington's examination of Jefferson's and Hamilton's written considerations as to its constitutionality.

While every argument that could be mustered was put to use by the actors within Congress,⁶⁴ the debate held within the newspapers suggests a narrower sense of accepted forms of constitutional argumentation. While Madison had made the tentative step on the floor of Congress of suggesting that his own presence at the Philadelphia Convention gave him insight into the limits and expectations of constitutional authority,⁶⁵ this notion met with a swift rebuttal from Elbridge Gerry in a speech reprinted in the *Federal Gazette*;

“This would be improper, because the memories of different gentlemen would probably vary, as they had already done, with respect to those facts; and if not, the opinions of the individual members who debated, are not to be considered as the opinions of the convention... the speech of one member is not to be considered as expressing the sense of a convention.”⁶⁶

A view similar to Gerry's appears to prevail in the wider debate over the Bank that took place within the printed sphere of newspaper publications. While numerous arguments were offered by both sides, the ability of the framers to offer a comprehensive understanding of constitutional intent is not evident. “Framer authority,” to the extent that it exists, appears in the form of

⁶⁴ Currie notes of the first Congress that “[m]ost of the tools of construction we recognize today were employed in the debates: text, structure, history, purpose, practice, and the avoidance of absurd consequences... various members invoked their recollection of events at Philadelphia to illuminate the meaning of particular provisions; they were met with very modern arguments for ignoring them.” Currie, *The Constitution in Congress*, 117.

⁶⁵ Jack N. Rakove, “The Original Intention of Original Understanding,” *Constitutional Commentary* 13 (1996), 171-172.

⁶⁶ *The Federal Gazette, and Philadelphia Evening Post*, “Debates Continued,” October 3th, 1791. Levy has suggested that with this incident as a single exception Madison never challenged the notion that the intent of the framers' had no weight in constitutional debates, and that he would publicly cite Gerry's comments as a guide to constitutional interpretation five years later. Leonard W. Levy, *Original Intent and the Framers' Constitution* (Chicago: Ivan R. Dee, 2000), 7-8.

deference to their individual understandings of the Constitution as a document, not to their understandings of its intentions.

A piece written in *Dunlap's American Daily Advertiser* in mid-February, aimed at a laying out both sides of the Bank debate, does invoke Madison's authority regarding the Constitution but without suggesting this insight should have any constitutional weight. Writing as "An American," the correspondent to the *Dunlap's American Daily Advertiser* seeks to review the arguments offered by both sides, but does so without repeating Madison's own claim to unique constitutional insight. Characterizing the congressional debate as one in which an understanding of the *implied* powers granted under the general welfare and taxation powers was pitted against an understanding in which the Constitution was seen only as granting those powers *expressly* given, the writer suggests the authority to turn to for guidance was not the framers, but the philosopher David Hume.⁶⁷ Madison's position on the proposed bank is noted, but in a manner that suggests such opposition ought not to have any constitutional import, but instead is only a reflection of Madison's personal judgment:

"The opposition to this bill was very ably supported in the House of Representatives, amongst others, by Mr. Madison, whose talents as a statesman, and integrity as an individual, have long been the deserved subjects of popular applause; and whose active part in forming and promulgating the present federal system of government, put out of all doubt his resolution to support it on every constitutional ground. He had been left, it is true, in a minority; but the sterling weight of his objections, and the solidity of his reasoning, lose nothing by having proved unsuccessful. This has equally happened to the most celebrated characters, who have, in different periods of the world, adorned the history of mankind, and whose names, like his, have been progressively obtaining what they must permanently hold – the affection, the veneration, and I had almost said, the adoration of their country."⁶⁸

⁶⁷ "For the American Daily Advertiser," *Dunlap's American Daily Advertiser*, February 16th 1791.

⁶⁸ "For the American Daily Advertiser," *Dunlap's American Daily Advertiser*, February 16th 1791.

Elsewhere in the article the Constitution is itself alluded in such a way as to suggest that constitutional interpretation has little connection with the framers as individuals. In discussing the privilege of granting incorporation, the writer restates the argument that “no exclusive privileges... having been ever contemplated by the constitution of the union” the Bank should not be incorporated. Strikingly in this passage the actor, capable of contemplation, is not an individual, but the Constitution itself. Absent from the initial deliberation over the powers of the Constitution are the framers themselves, a depiction which suggests both the authority of the document itself as a document and undermines the notion that any individual might offer a definitive understanding of it.

Other articles seeking to make an effective case against the Bank adopt a variety of arguments, but none make allusion to Madison’s self-claimed insight. As “An American” suggested, the writers opposed to the Bank made much of the notion that the Constitution granted only expressed powers. “A Pennsylvanian”, writing an article which appeared in *Dunlap’s American Daily Advertiser* in early February and was later reprinted in the New York *Daily Advertiser*, exclaimed that “[a]ll the reasonings in the world can never, from the constitution of the United States, deduce a power in Congress to establish a National Bank.”⁶⁹ Denouncing the notion that such a power is implied in the Constitution, the writer rested his case with the observation that the Constitution “says expressly” that no preference can be given to any state with regard to commerce or revenue. Later that month, a letter published in the *Federal Gazette* signed “Z” would reiterate a similar argument, countering claims based “on supposed implications from the Constitution of the Union” with the challenge that “until the power of laying taxes and of borrowing money should be proved synonymous to the granting charters of

⁶⁹ "For the American Daily Advertiser," *Dunlap's American Daily Advertiser*, February 5th 1791.

incorporation... these arguments will fail of their weight.”⁷⁰ Another writer to the same paper suggested that “...unconstitutional must be deemed the National Bank under the charter of a government, not empowered to grant any, and who are expressly restrained from granting exclusive privileges or preferences to any individual whatever.”⁷¹

Alongside the argument that the Constitution could only grant express powers, and possibly as consequence of it, an understanding of the document as a compact of states is evidenced among some critics of the Bank. Powell has suggested that a “states’ compact” interpretation of the constitution can be dated to the Kentucky and Virginia resolutions in the later 1790s,⁷² but in early 1791 the opponents of the Bank seem to have been moving towards such an understanding. The writer “Mercator,” in an article which first appeared in *Dunlap’s* but which was reprinted in New York a week later, made the case for regarding a national bank as infringing the rights of the states. Viewing the proposal as unconstitutional, the author warned of the need to be:

“...on our guard how we suffer the doctrine of political expediency or necessity, or plausible constructions of the constitution, to be pleaded against manifestly retained rights, in the separate states.”⁷³

Mixing an understanding of constitutional interpretation grounded in current practice with a strong distrust of the centralization of power deemed inherent in a national bank, “Mercator” cited the incorporation of a bank in Baltimore as evidence that “the states consider this power to remain with them,” and that the establishment of the national Bank would “indirectly clip the wings of all similar institutions on the continent.” Once again Hume is cited as an authority

⁷⁰ “For the Federal Gazette,” *Federal Gazette, and Philadelphia Evening Post*, February 22nd 1791.

⁷¹ “For the Federal Gazette,” *Federal Gazette and Philadelphia Evening Post*, February 5th 1791.

⁷² H. Jefferson Powell, “The Original Understanding of Original Intent,” *Harvard Law Review* 98 (1985).

⁷³ “For the American Daily Advertiser,” *Dunlap’s American Daily Advertiser*, February 4th 1791. See also “From the American Daily Advertiser,” *Daily Advertiser*, February 11th 1791.

relevant to this debate. However the article stopped short of expressing a fully developed notion of the Constitution as a compact of states, placing greater emphasis on the corruption federal action could bring.⁷⁴ This should not be taken as evidence that the states' compact understanding was beyond public consciousness. Elsewhere less nuanced critics of the Bank were more ready to advance an argument grounded in the states. On the day before "Mercator's" article, a correspondent to *Dunlap's American Daily Advertiser* was willing to state more directly that "[w]hatever powers the state-governments did not grant, are expressly to be retained."⁷⁵

On the other side of the argument, writers seemed to share in the broad consensus that constitutional interpretation was a process of identifying the meaning of the text as written, but disagreed as to the correct method by which this understanding was achieved. They also seemed to share the view that the intention of the individual actors at the Philadelphia Convention was of little assistance in this process.

Writing in *The Gazette of the United States*, "A Constitutionalist" argued that the Bank's incorporation ought to be understood in terms of the "necessary and proper" powers granted to Congress. Sharing (and given the provenance of the *Gazette*, quite probably expressing⁷⁶) Hamilton's understanding of the federal government as charged with energetically using its

⁷⁴ The article drew attention to the corruption wrought in Britain by the incorporation of private agencies, noting that "[t]he National Bank has had its share also in accelerating the national ruin."

⁷⁵ "For the American Daily Advertiser," *Dunlap's American Daily Advertiser*, February 3rd 1791.

⁷⁶ John Fenno intended his paper, the *Gazette of the United States*, to be a supportive organ for the newly established federal government relying purely on government printing contracts for income. Founded in New York, by 1789 financial pressures forced Fenno to accept advertisements and Hamilton was drawn to the paper as a vehicle for responding to the criticisms being leveled against him. In 1793 Hamilton would take a direct interest in the newspaper, which had moved with the government to Philadelphia in 1791. Carol Sue Humphrey, *The Press of the Young Republic, 1783-1833*. (London: Greenwood Press, 1996), 45; Jeffrey L. Pasley, *"The Tyranny of Printers": Newspaper Politics in the Early American Republic* (Charlottesville: University Press of Virginia, 2001), 51-59.

powers, “A Constitutionalist” answers suggestions of the Bank’s unconstitutionality with the question:

“...if it is a useful mean for carrying into effect any of the powers specially vested in the government of the United States, and does not infringe the rights of any individual state or person, on what principal can it be unconstitutional?”⁷⁷

Viewing it as within the “discretion of Congress to chuse the most fit and proper means” for carrying into effect the powers with which it has been charged, “A Constitutionalist” cites the Revolutionary War practice of operating a national bank as evidence that such an institution is both useful and necessary to an administration. But if the Revolutionary War offers a precedent, it seems not to have been necessary or useful to cite the *revolutionaries* themselves. Despite the overlap in those active during the Revolution and those at Philadelphia in 1787, the authority in the matter to which “A Constitutionalist” turns is “[t]he celebrated MR. BURKE” – in order to show the economic advantage of a national bank. Constitutionality is legitimized by the contribution of a given institution to the execution of the powers granted to the federal government. In this respect, as with the opponents of the Bank, the text of the Constitution matters, but at a degree removed. The federal government’s obligation to oversee the “fiscal operations of the Union” leads to the usefulness of establishing the Bank – and “all the citizens of the United States will share in the public benefits derived from it.” Despite the available argument that the actors at Philadelphia would have not sought to reduce the powers of the wartime Congress which previously made use of the power to incorporate bank, it is never made.

The reluctance to make use of an argument rooted in the intention of those involved in the deliberations at Philadelphia is manifest in an article penned by “Lucius” in the *New-York Daily Gazette* of the same month. Identifying Hamilton’s dual nature as the author of the

⁷⁷ "On the National Bank," *Gazette of the United States*, February 23rd 1791.

National Bank legislation and a key figure in the Philadelphia Convention, “Lucius” seeks to highlight this double role in order to strengthen the argument in favor of the constitutionality of the Bank. However, the manner in which this is attempted places emphasis on Hamilton’s *knowledge of the document*, not his knowledge of the intentions behind it:

“It will not, I believe, be denied by any candid person, that the projector of this national bank, is as perfectly informed of what is, and what is not constitutional, as any man. His agency in-framing [sic] the constitution gives him an advantage, in that respect, which many do not possess; and as to the doctrine of constructions, his legal knowledge places him in the foremost rank.”⁷⁸

The coupling of Hamilton’s legal credentials with his presence at the Convention in 1787 suggests that attendance at the debates is not in itself enough to ensure accuracy in identifying the constitutional. Instead, Hamilton’s authority with regard to the Constitution emerges from a close understanding of the text *and* the ability to construct its meaning in a sound and lawyerly fashion. In place of making an argument based on Hamilton’s knowledge of the framers’ intent “Lucius” opts to echo the argument of “A Constitutionalist” that the constitutionality of the Bank rests on its ability to enhance the execution of the powers entrusted to the federal government by the Constitution. Once the “utility and convenience of a bank to government, in the operations of finance” is considered, the reader is invited to “admit it is not only an *expedient* but a *necessary* provision” (original emphasis). Indeed, “Lucius” is prepared to go further and denounce opposition to the Bank as opposition to “the general sense of America” given the difficulties arising from a reliance upon specie across such a large nation. Rising the stakes of Bank opposition, “Lucius” offers the argument that federal government’s constitutional obligation to maintain the Union requires a national bank.

⁷⁸ “For the New-York Daily Gazette,” *New-York Daily Gazette*, February 12th 1791.

A less stark article, but one which sought to situate the question over the Bank in a wider consideration of the Constitution, was published a week and a half after this in Philadelphia. Published in *The Federal Gazette*, “Remarks on the Constitutionality of the National Bank” offered a measured articulation of the constitutional theory emerging amongst supporters of the Bank. Opening with the claim that “[t]hough Congress possess none but delegated powers, they possess many that are not expressed, and all that are necessary to carry into effect the powers specifically given, in the best manner,” the article sought to show the need for measures about which “the constitution is silent.”⁷⁹ After pointing to instances of powers exercised without explicit authority, the author encapsulates the position of those supporting the Bank – that without implied powers, the expressed powers have little meaning:

“With the aid of a bank, the power of borrowing may be exercised for the great purposes for which it was given; without it, the power when most wanted, will be most useless, - the rights of it in the constitution will insult instead of relieving the public distress.”

This position - that the Constitution’s grant of authority must imply powers not directly expressed in order that the document can be operable – foreshadowed arguments regarding the need to interpret the Constitution as a holistic document that would be advanced in 1800-01. Those later Federalist arguments would move beyond the notion of implied powers to stake out an argument for the inherent completeness of the constitutional document.

Before turning attention to that later debate however, it is worth noting that as with those opposing the Bank, its supporters in 1790-91 did not turn to any notion of framer intent but instead looked to the text of the Constitution itself for guidance as to its meaning. Such an

⁷⁹ "Remarks on the Constitutionality of the National Bank," *Federal Gazette*, and *Philadelphia Evening Post*, February 21st 1791.

approach would be put under pressure in the electoral impasse of 1800-01, and would result in a wider variety of approaches to constitutional interpretation, although the invocation of framer intent within constitution debate would not yet become a widespread device. Rather, the election would create the context in which innovative and radically differing approaches to constitutional interpretation would meet and challenge each other within the printed public sphere.

The Electoral Crisis of 1800-01

Discussions over the constitutionality of political acts continued throughout the 1790s. In 1800 such a debate emerged in response to the system of presidential elections. The Convention of 1787, not foreseeing the emergence of the party system, had crucially failed to provide in the document for the situation wrought by the election of 1800. When the electoral college ballots were opened in late 1800, the count gave the Republican candidates for president and vice-president, Jefferson and Burr, an equal number of votes. With the Federalists seeking to exploit this situation in order to block Jefferson's appointment, the administration of John Adams moved towards its date of expiration without a replacement having been constitutionally recognized. As the impasse grew more critical, newspapers provided a platform for discussion of how a constitutionally sound solution could be reached – and by extension how the Constitution itself ought to be interpreted with regard to this apparent blind spot. In contrast to the debates of 1790-91, the interpretations proffered in 1800-01 moved beyond textual examination and embraced a wide variety of possibilities, including framer intent. However, the very extent of the techniques suggested belies any claim that a dominant mode of interpretation existed within the popular public debate of the newspapers.

Bruce Ackerman has suggested that the disputed election of 1800 heralded in a decade of “institutional struggle between the men of 1800 and the men of 1787,”⁸⁰ but within the debates engaged most immediately with the election – that is to say those seeking to break the impasse it caused - it is hard to draw a neat division into “constitutional conservatives” and “republicans.” The very absence of a constitutional solution to the problem within the document meant that no one could advocate a strict textual interpretation in this instance, and therefore all those contributing to the printed debate on the subject were required to shore up their adopted position with some degree of interpretative innovation. Constitutional debate could not take the form of a spectrum running between advocacy for implied powers and an adherence to the doctrine of expressed powers – everyone was engaged in locating a source for implied meaning.

In Washington the *National Intelligencer*, founded with the intention of emerging as quasi-official voice of a future Jefferson administration,⁸¹ sought to frame constitutional interpretation in terms of popular democracy, placing itself at odds with the textual and states’ compact approaches emergent in 1790-91. In reviewing the role of *The National Intelligencer* in the 1800 election, Mel Laracey has highlighted the manner in which essays were used in the course of laying out an understanding of constitutional interpretation grounded firmly in notions of popular will.⁸² Writing in two overlapping series and an extended letter, “Aristides,” “An

⁸⁰ Bruce Ackerman, *The Failure of the Founding Fathers: Jefferson, Marshall, and the rise of presidential democracy* (Cambridge, Mass.: The Belknap Press of Harvard University Press, 2005), 6.

⁸¹ Jefferson persuaded Samuel Harrison Smith to set up *The National Intelligencer* in the summer of 1800 and it remained the semi-official paper of Republican administrations until the end of the Monroe administration. The close proximity of the newspaper to the Jefferson administration was highlighted by Smith’s ability to reprint Jefferson’s first inaugural speech on the very day it was delivered. Mel Laracey, “The Presidential Newspaper as an Engine of Early American Political Development: The Case of Thomas Jefferson and the Election of 1800,” *Rhetoric & Public Affairs* 11 (2008), 13. The newspaper marked a shift by Jefferson away from the more robust and less refined *Aurora* of Philadelphia, which had functioned as the premier opposition organ in the 1780s under the editorships of Benjamin Franklin Bache and then William Duane. Humphrey, *The Press of the Young Republic*, 74.

⁸² Laracey, “The Presidential Newspaper as an Engine of Early American Political Development.”

American,” and “a respectable citizen” cumulatively offered an understanding of constitutional interpretation that appeared radically democratic when compared to the debates regarding the chartering of the first Bank.

In late December 1800 a contributor to the *National Intelligencer* using the pseudonym “Aristides,” began a series of essays “On the Election of President” which sought to argue that the constitutional impasse must be broken by recognition that popular will was the origin of constitutional and governmental authority. To ignore the popular mandate given to Jefferson in the election would be to call forth a broader constitutional crisis. In the third, and most constitutionally minded, essay, “Aristides” seeks to examine the consequences arising from the House of Representatives failing to acknowledge the people’s choice of Jefferson as legitimate president.⁸³ The essay’s main aim is to depict the terrible consequences of the House of Representatives failing to grant Jefferson the presidency, but within the discussion an understanding of the Constitution emerges which is at odds with the “states’ compact” doctrine. “Aristides” suggests two courses would arise from a continuation of the impasse in the House – the dissolution of the general government or its continuation in a tyrannical form. As such:

“It becomes the people of the United States to contemplate with cool collected wisdom these alternatives; to estimate the effects of each on the tranquility [sic] and prosperity of the empire; and to appreciate the actions of those public agents who would make one or other the necessary result of their measures.”

Crucially in this description is the view that it is the people themselves who have the authority to decide the fate of the government and that of those who bring it to the brink. Apparently more than a rhetorical device, this possibility is expounded elsewhere in more overtly constitutional terms. Reviewing the situation itself, “Aristides” argues that Congress has no authority to fill in

⁸³ “On the Election of President No. 3,” *National Intelligencer and Washington Advertiser*, January 7th 1801.

constitutional gaps as its powers are themselves derived from the popular and *express* grant of power in the Constitution:

“As the constitution has made no provision for the temporary discharge of executive duties in the case of no election; not having, apparently, contemplated such a contingency; and as Congress therefore possess no power, in such an event, derived from the constitution, it follows that after the third day of March there would be no executive magistrate.”

In such a scenario the powers of the general government would not devolve to the states, as might be expected of the states’ compact theory, but would return to the people themselves, for “[t]he Federal Constitution was the act of *the people* of the United States; not of the states themselves.”

Writing in the same newspaper, “An American” drew on many of the themes developed by “Aristides” to paint a similar fearful picture of the consequences of the House rejecting Jefferson’s claim to the presidency. Regarding the Constitution as to some degree a reform of the Articles of Confederation, “An American” seemed more reluctant to reject a states’ compact understanding of the Constitution and saw the dissolution of the general government as returning power to the states. However, in arguing that such a failure would mean a reversion back to the Articles of Confederation, “An American” was nonetheless quick to point out that this would result in all the flaws that the Constitution had sought to alleviate and was not a desirable step.⁸⁴ If less critical of the states’ compact theory, “An American” was nevertheless similarly engaged in attempting to reconcile the lack of textual constitutional guidance as to how to break the electoral impasse with Jefferson’s claim to a clear popular mandate. Recognizing that the situation was “entirely new,” “An American” saw in the disputed election the problem of how an

⁸⁴ “To the House of Representatives of the United States of America,” *National Intelligencer and Washington Advertiser*, January 14th 1801.

entrenched constitution might be revised retroactively in order that the popular will could prevail, without undermining its claim to be a higher law.⁸⁵ Identifying the sophisticated issue at stake, the writer attempted to address it in mid-January with the claim that:

“[t]he spirit of the constitution requires the will of the people to be executed.”

This innovation, not fully elucidated at this point, that the Constitution possessed a “spirit” that both informed and extended the meaning of the textual document, offered a manner in which the will of the people might be invoked without directly conflicting with the entrenched Constitution. It also signaled a departure from constitutional debate as deliberation over the meaning of the text itself, and a movement towards comprehending the Constitution as an embodiment of the popular will.

Just under two weeks later, on the 23rd January 1801, “An American” returned to the question of the election in the same newspaper in a third article which avoided use of the phrase “spirit of the constitution,” but which seemed to add substance to the concept. In a turn which would have horrified the opposition writers of the early 1790s, “An American” advanced the argument that the Constitution could be understood to express something quite clearly despite there being no text within the document to that effect. By observing the *practice* of the Constitution, one would be able to derive a contemporary understanding of the document:

“It is plain that Congress, in that important expression of the constitution, the *contemporary* expression of the sense of that instrument, have not acted upon the idea of a vacancy at the end of the presidential terms;”⁸⁶

Warming to this possibility, he continued:

⁸⁵ “To the House of Representatives of the United States of America,” *National Intelligencer and Washington Advertiser*, January 22nd 1801.

⁸⁶ “To the House of Representatives of the United States of America,” *National Intelligencer and Washington Advertiser*, January 23rd 1801. (Original Emphasis).

“The meaning of the constitution is perfectly clear; it is **as if** it should have said, *and in case a person, being President, shall die, be removed, resign, or become incapable*, an officer, to be named by law, shall act as President.” (emphasis in bold added).

By observing the expectations and actions of individuals during their interactions with the Constitution and “the contemporary expression of the sense of that instrument,” a form of constitutional interpretation was possible. Moreover, such an approach to interpretation offered the possibility that contemporary popular feelings played a role in constitutional debates, a possibility developed further by another writer in the same paper.

“A respectable citizen” contributed a letter to “a Member of Congress” in 21st January edition of *The National Intelligencer* which argued that with regard to the electoral crisis the Constitution was silent, but not necessarily deficient. Writing in between the two interventions of “An American,” “a respectable citizen” brought the problem at hand into sharper focus and offered a solution that involved a more explicit call for popular involvement.⁸⁷ Identifying the democratic paradox that “An American” had grappled with, the writer confidently detailed the nature of the problem⁸⁸ before asserting, “I am inclined to think that this is not a defect capable of remedy.”⁸⁹ Without the possibility of a legally derived resolution “a respectable citizen”

⁸⁷ “Letter from a respectable citizen to a Member of Congress, on the Election of a President,” *National Intelligencer and Washington Advertiser*, January 21st 1801.

⁸⁸ “Admitting then the not providing a remedy for this apprehended equality of suffrage is a defect in the constitution, yet it cannot be amended by law, not only because the constitution has provided a different mode of curing its defects, but also because such a mode of amendment would clearly reduce the constitution to the state of any other law, to be altered, abrogated, or exchanged for another, according to the will of the legislature.” “Letter from a respectable citizen to a Member of Congress, on the Election of a President,” *National Intelligencer and Washington Advertiser*, January 21st 1801.

⁸⁹ That both “An American” and “a respectable citizen” seem to have identified the paradoxical nature of the situation they faced, and in doing so highlighted a fundamental problem of a democratic-constitutional order, seems to belie the suggestion of Laracey that the writers resorted to arguing “simply and directly” against the “sophisticated, legalistic proposals” of the Federalists and utilised “a brutally simple rebuttal to the practical arguments of the Federalist essayists” Laracey, “The Presidential Newspaper as an Engine of Early American Political Development,” 27-28. Instead, from the viewpoint of the early Twenty-first century, it might be argued that these writers were moving towards a Schmittian understanding in which

believed that “in this instance, as in many others, it was necessary to confide in the force of public opinion, for the execution of the constitution.” Drawing a parallel with the potential for states to derail the operation of the general government by failing to appoint senators, “a respectable citizen” advances his argument, suggesting that the Constitution omits resolution for such instances *because* it rightly falls to the people to decide the constitutionality of such actions:

“There is no constitutional provision for this dilemma either; and wherefore? – because it is not capable of such a provision. It would be a case proper for the tribunal of public opinion, which would either decide that the progress of the government ought to be arrested, or that these legislatures had perpetrated the most consuinmate [sic] act of treason against the happiness of society.”⁹⁰

“No body thought of a remedy for the case quoted, because no body conceived that any other than the force of public opinion was necessary.”

But the writer goes further than allowing that the people are the correct authority to fill in the gaps in the constitutional document – the operation of Constitution itself is to be assessed against the ability of the people to express themselves in government. Moving close to “An American’s” notion of the spirit of the Constitution, the writer suggests that constitutionality is that which accords with the expression of popular will.

“A respectable citizen” sees the Constitution as operating in tandem with the will of the people in a manner that enables the latter to function as the basis of government. Public opinion has selected Jefferson as president, and as a consequence the Constitution can be judged as operational if it allows him to ascend to office. The Constitution enables government grounded on public opinion and should not be understood as restrictive of that process – when public

moments of constitutional exception universally occur and require the intervention and acknowledgement of a sovereign authority, in this case in the form of the people. Cf. Carl Schmitt, *The Crisis of Parliamentary Democracy*, trans. Ellen Kennedy, (Cambridge: MIT Press, 1998).

⁹⁰ He continues “It would be in fact most clearly a case of revolution; if public opinion declares in its favour, it is right; if that rejects the attempt, it is followed by a degree of execration and punishment, which constitute the only possible provision against vicious experiments, and is sufficiently awful sometimes to virtuous effects.”

opinion is no longer the basis of government an unconstitutional act has taken place. The question at hand therefore is not over the constitutional innovation that is required to enable the election of a president to take place, but the constitutional innovation that is blocking Jefferson from office. The Federalists, by resisting Jefferson's selection, are "engaged in a stratagem to break the constitution," an attempt "to substitute the will of faction for the will of the people, so that hereafter changes of men in office will be epochs of revolution." In the final sentence of the article he offers a motto by which "all good men" ought to adhere, but which would seem to Federalist eyes to invert the very purpose of a constitution; "The public will, and the supremacy of the constitution over government." Here public will and the supremacy of the constitution are weighted equally, but drawn distinctly and apparently both placed in a position over government. However the implicit claim must be that the supremacy of the constitution exists when the public will governs – that the constitution functions when the will of the people is heard and authoritative.

Between these three correspondents to the *National Intelligencer* the possibility for a mode of constitutional interpretation that was radically (and to the Federalists, dangerously) democratic was emerging. Accepting that the Constitution did not provide guidance for every eventuality, they saw such gaps as instances in which public opinion ought to lead the way, enhancing its claim to be an expression of the people's will. Moreover, they were moving towards recognition of problems inherent to a society seeking to be governed by both a constitution and popular will – even if they lacked the conceptual insight to deal with these problems in a philosophically complex manner. What is most significant to the discussion at hand however is that the Constitution was at no point regarded as the untouchable product of the Philadelphia Convention. Rather it was a basis for a democratic society that would be shaped and

reshaped by the democratic will of the people and ultimately subject to that will.⁹¹ The intention of the founders was not therefore invoked by these writers at any point, despite the presence of Madison at the head of their party.

If the quasi-official Republican writers made little use of intention as a guide to constitutional interpretation, those who opposed them were more inclined to do so. In the Federalist newspapers of the nascent capital at Washington, legally-minded writers made the notion of intent central to their constitutional arguments against the appointment of Jefferson as president. However, their understanding of the conception of intention did not immediately correspond with that of those engaged in the Constitution's initial design. For the most part invoking an understanding of intent that drew on contemporary legal practice, they fashioned a position that countered the Republican framing of the constitutional debate as a matter of democratic will. Utilizing the legal norms of interpretation of the time, they put forward an argument which worked to limit both the democratic potential of the Constitution and popular ownership of it, signaling perhaps the counter-revolutionary potential of a re-conceptualization of the relationship between the Constitution and the People's claim to it. While this move is significant of itself, this group of articles is also marked by the explicit invocation of framer intent within one essay. While at this point the exception rather than the norm, when coupled with the other articles it is possible to make out strands of what would become the dominant mode of constitutional discourse within newspapers in a later period.

⁹¹ An understanding that contains some of the interpretative traits of Dworkin's "moral reading" of the Constitution. Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution*, (Cambridge Mass.: Harvard University Press, 1996).

The turn of the year in 1801 saw the publication of an extended essay, signed with the pseudonym “Horatius,” in the *Washington Federalist* and the *Alexandria Advertiser*. This article argued that in the event of continued deadlock an existing officer of the Executive should be appointed president. Bruce Ackerman has presented much circumstantial evidence to support the view that the author may well have been John Marshall, presenting a clear personal interest in such an argument while he remained arguably the most senior executive officer after the president and vice-president.⁹² Whether or not the articles, entitled “The Presidential Knot,” were clouded by a conflict of interest, their approach to constitutional interpretation provides a marked example of the common law conception of attempting to identify the intent of a document in its entirety. Powell has noted that American lawyers well into the Nineteenth century looked primarily to common law tradition and the Protestant notion of “sola Scriptura” (scripture alone) in order to guide their approach to interpretation.⁹³ With regard to constitutional interpretation, the latter yielded the textual conflicts exemplified in the newspapers debates surround the First Bank of the United States. The former common law tradition, drawing upon Blackstone, urged that the document be interpreted against its intent – but the intention as defined by the “reasonable and legal meaning” of the words of the *document*, not the original intent of the *parties* to the document.⁹⁴ The “Horatius” articles draw upon such a legal tradition and present the argument that constitutional interpretation is most sound when it seeks to understand individual clauses as parts of the document as a whole.

⁹² Ackerman, *The Failure of the Founding Fathers*, 41-45.

⁹³ Powell, “The Original Understanding of Original Intent.”

⁹⁴ A partial exception to this existed with regard to wills, which over the Nineteenth century were increasingly interpreted with regard to the intention of the parties (within the constraints of the actual legal language used). Powell, “The Original Understanding of Original Intent.”

Identifying the clauses that in his opinion were most relevant to the problem at hand, “Horatius” sought to present an interpretation that most effectively unified the Constitution in a single holistic meaning. Pointing to the clause in the first section of the second article regarding the removal of the President from office⁹⁵ that had become the textual locus of the constitutional debate over Jefferson’s election, “Horatius” argued that interpretation must be in accordance with the document as a whole. The Constitution’s self preservation must, “Horatius” reasoned, be regarded as its primary end. Therefore any clause within the document is most accurately interpreted in the manner which best ensures that preservation, as the document’s intent. Making this approach to interpretation explicit, he states that:

“In the interpretation of the words of a statute and more strongly in the interpretation of a written constitution or form of government, that interpretation is never to be made which will frustrate the end of the statute or constitution. If therefore the words of the constitution be susceptible of two constructions, one which... will put an end to all its operations, and the other which will continue its existence, the latter must undoubtedly be preferred...”⁹⁶

Moreover, the Constitution must itself provide for the possibility that a president would not be selected through the usual election mechanisms – to fail to do so would render it unable to preserve itself:

“For such a state of things the constitution ought not to be understood to be unprovided, or it will be understood to be without the means of self preservation.”

On this basis “Horatius” concluded that Congress was obliged to appoint an executive officer to the presidential chair in the event of a continued deadlock. However, the actual conclusion is not as significant as the mode of argumentation used. Framing the debate as one of legal

⁹⁵ “In the case of removal of the President from office or of his death, resignation or inability to discharge the power and duties of the said office, the same shall devolve on the Vice President, and Congress may by law provide for the case of removal, death, resignation or inability of both President and Vice-President, declaring what officer shall then act as President, and such officer shall act accordingly until the disability be removed or a President shall be elected.” U.S. Constitution, Art. II Sec. 1.

⁹⁶ “The Presidential Knot,” *Washington Federalist*, January 6th 1801.

interpretation over a necessarily comprehensive document did much to shore up the Federalist position.⁹⁷

Establishing that the Constitution must contain within it a solution to the problem at hand provided the Federalist correspondents with a strong argumentative position. In the first instance it countered the Republican argument that an oversight in the Constitution required a return to the people as the legitimate authority. Elevating the Constitution to the status of a document without need of revision enabled the Federalists to regard the text as wholly distinct from the people as authors. Secondly, it limited the extent of the debate to one of legal interpretation – and so by extension to those with legal training. As a consequence, Federalists disputed the accurate interpretation of the Constitution, but never challenged its ability to provide a solution directly derived from it. Indeed, it seems not unlikely that “Horatius” was expanding on the argument put forward by “Civilis” on 22nd December in the *Alexandria* paper that;

“Th[e] interpretation of the text in the Constitution that has been quoted, is to be maintained not only for the reasons which have been given, but because if the words be at all doubtful, that construction shall be given which is indispensably necessary to preserve the existence of the government.”⁹⁸

Even those wary of the notion that the presidency should be handed to a figure who did not participate in the election, such as “Constantius” who would challenge “Horatius” in the *Alexandria Advertiser* three days after the initial publication of “The Presidential Knot,” did not challenge the idea that the Constitution itself provided for the solution to the electoral deadlock.⁹⁹

⁹⁷ If the identity of Horatius was indeed Marshall, it also offers an early indication of his thinking with regard to the Constitution’s “perfection” that would be evident in the later Supreme Court Cases discussed in Chapter 4.

⁹⁸ “Who will be the next President is uncertain,” *Alexandria Advertiser*, December 22nd 1800.

⁹⁹ “For the *Alexandria Advertiser*,” *Alexandria Advertiser*, January 6th 1801.

In amongst the Federalist exchanges over the self contained meaning of the Constitution however, was one article that pushed for a broader understanding of constitutional intent. The assumption that the Constitution could address the impasse without the invocation of popular will was shared by “Eumenes” who wrote in the *Washington Federalist* on 4th February. Reiterating the Federalist position that the Constitution could provide for the overcoming of the electoral deadlock and so avoid reference to the popular will (“Is then such a case totally unprovided for by the Constitution?... I think not”¹⁰⁰), “Eumenes” nevertheless reached beyond the internal textual examination adopted by his Federalist colleagues and sought to substantiate his position with reference to the intentions of the framers and ratifiers. Turning to the meaning of Art I, Sec. 2, “Eumenes” disputed the notion that presidential “inability” could be understood to extend to the case at hand, in order to argue that in the event of continued deadlock John Adams ought to remain president for a further four years. Key to his argument was establishing that “inability” did not indeed extend to the current case. In order to do so he argued that it was never the intention of those involved in erecting the Constitution that it should:

“On the fullest consideration I have been able to give the subject, I am convinced that neither the general convention, who framed, nor the state conventions, who ratified the constitution, ever contemplated the consequence of the expiration of the time, for which the President was elected under the term inability to discharge the powers and duties of that office.”

Elsewhere he went further than arguing that the intention of the framers (or in this case their lack of contemplation) might allow for a fuller understanding of the Constitution text. In a reversal which suggests a greater belief in unity between framer intent and Constitution meaning than can be seen elsewhere, “Eumenes” suggests that the Constitution itself is evidence of the framers’ intent – that what is literally written is evidence of what was intended:

¹⁰⁰ "For the Washington Federalist," *Washington Federalist*, February 2nd 1801.

“...there is a clause in the Constitution, which to my mind, most satisfactorily proves what was the *meaning* and *intention* of those who framed that instrument, and establishes its *true construction*” (emphasis in original).

“Eumenes” here moves to make the “intention” of the framers the “true construction,” with the Constitution operating as textual evidence by which that might be derived. To be sure, none of his contemporaries, especially the Federalist authors, would have argued that there is no connection between the text and the intention of the parties to it – each in their own manner is engaged in showing that the Constitution means and was meant to mean something – but “Eumenes” seems here to suggest that the Constitution exists as, and is of value as, a record of the intention of particular actors. Consequently, he places value on a reading of the Constitution that seeks to identify this particular intention, rather than the Constitution’s spirit or the legal meaning of the text. The Constitution then ought to be interrogated for the evidence it provides of this intent:

“In the constitution its framers took into consideration the case of the efflux of the time for which the President should be chosen, and for *that case* made *particular* and *specific* provisions, in dependent [sic] of the clause in question; a convincing proof that this case was not meant to be embraced by that clause.”

Here the structuring of the Constitution is used to derive the intended meaning of a particular clause of the document. Utilizing the entirety of a document to identify the meaning of a particular clause would not have been unfamiliar to the legalistic writers at the time, and indeed much of the “Horatius”-“Constantius” exchange focuses on the manner in which such an action is carried out. However, to directly link this action to a process of discovering what the parties to the document had originally intended, and to make that intention the end of such a process, places “Eumenes” at odds with his contemporary newspaper commentators. Just ten years later the position would be very much reversed.

The Rechartering of the National Bank

Twenty years after the initial founding of the National Bank of United States, the expiration of the Bank's charter led to the necessity of Congress choosing to renew the charter or allowing it to lapse. The opportunity for opponents of the Bank to reopen the constitutional question settled in favor of the Bank in 1791 was quickly seized upon, and the ensuing newspaper debate saw both sides attempt to prove the constitutionality of their position. The debate itself was marked by the dominance of a constitutional interpretation that rested firmly on ideas of framer intent and textuality. Two prominent but overlapping schools of interpretation opposed to the Bank were evident, states' compact and strict constructionist, but both made framer intent central to the justification of their position. On the other side of the debate, those who argued for the renewal of the Bank's charter likewise made reference to the Founding generation, arguing that the initial charter provided proof that such an institution was the intention of that esteemed generation. Neither side moved towards what would be today recognized as framer intent per se, but both saw value in the idea that an intention of strict construction existed.

By late 1810 correspondents within Republican papers had already begun to formulate arguments against the constitutionality of renewing the Bank's charter. Drawing on the arguments put forth twenty years earlier, an article printed in the *Baltimore American* and the *Republican Star* of Easton, MD, during December returned to the position that federal power extended only to those express powers granted by the Constitution. Arguing that "[t]he doctrine of precedents here does not apply," the article stated that:

“Whoever will trouble themselves to examine the constitution of the U. S. will find that the congress of the U. S. derive all their powers from that instrument *alone by expression*, and not by *implication*.”¹⁰¹ (Original emphasis)

Elsewhere, an article signed “Pleb” in the *Ostego Herald* claimed to borrow directly from the 1790-91 debates in linking a conception of expressed powers to states’ rights:

“It was contended, that the constitution delegated to congress no power to incorporate banks; that all legislative power *not* delegated to congress by the constitution, is reserved to the states.”¹⁰²

The return to the position that strict construction prohibited the establishment of a bank made logical sense given the availability of such arguments from the debates of 1790-91. However their deployment in this second round of discussion was characterized, and distinguished from the earlier 1790-91 arguments, by the wide use of framer intention as a justification for this position.

A piece authored by “Harmodius” and addressed to the Virginia Legislature appeared in the *Enquirer* in mid-December made much use of Madison’s 1790-91 opposition to the Bank as the basis for the author’s own opposition, resurrecting Madison’s argument that “a power to grant *charters* of INCORPORATION, had within *his* [Madison’s] recollection been proposed in the general convention and REJECTED.”¹⁰³ But in his consideration of the restriction to the express powers granted by the Constitution “Harmodius” moved beyond the standard arguments of 1790-91 and considered the reasoning behind strict construction in terms explicitly of intent. For “Harmodius” a limited notion of the general welfare clause was constitutional as a consequence of the manner in which those at the Philadelphia Convention had come to make use of that wording:

¹⁰¹ “A National Bank,” *Republican Star or Eastern Shore General Advertiser*, December 4th 1810.

¹⁰² “National Bank,” *Ostego Herald*, December 8th 1810.

¹⁰³ “To The Virginia Legislature,” *The Enquirer*, December 15th 1810.

“Another reason why this [broad] construction should not prevail, is that the term “common defence and general welfare,” were evidently taken by the framers of the constitution from the 8th article of confederation, and never received the interpretation attempted now to be given to them.”

This approach to constitutional interpretation has parallels with “Eumenes” in 1801 insofar as the document is a record by which to interrogate the minds of those composing it in 1787, but also indicates a willingness to go beyond the document itself in order to achieve this. Here we see the claim that the correct construction of the Constitution is the one which most closely aligns with the intention of that Convention – their meanings and understandings of the language deployed is superior to the internally consistent legalistic usage within the text or any spirit or popular will supposed to surround it. In this argument strict construction is championed not because it ensures that the expressed will within the Constitution is honored, but because that is what the framers envisaged in choosing the words that they did.

The tying of framer intent to strict construction is also evident in two other significant contributions to the printed debate over the Bank. The first, entitled “Mr. Bland’s Protest Against a National Bank,” appeared in the *Enquirer* in late November and was reprinted in the *Pittsfield Sun*, a Massachusetts paper, on the 12th December.¹⁰⁴ Taking the familiar refrain that the powers of Congress were of a particular nature and did not extend to the incorporation of a national bank, Bland rejected the argument that congressional powers could be “implied” by the Constitution. The doctrine of implication was a dangerous one which “[l]ike an insidious serpent, it... wreathed and coiled itself about other governments, and stung them in the very vitals.”

Moreover, the construction of the Constitution as a grant of particular powers was the

¹⁰⁴ Addressed to “the Senators and Representatives of the State of Maryland” in Congress, the subtitle stated that it had been submitted to the Legislature of Maryland. “Mr. Bland’s Protest, Against A National Bank,” *The Enquirer*, November 20th 1810; “To the Senators and Representatives of the State of Maryland in the Congress of the United States,” *The Pittsfield Sun; or, Republican Monitor*, December 12th 1810.

understanding of the Constitution's "best friends at the time of its adoption" who worked to ensure that it would continue to be understood that way – "& lest other and improper constructions *should* be given to it, the tenth article of the amendments... was finally adopted..." Here framer intent is once more deployed in order to show the primacy of a strict construction approach to constitutional interpretation, and the Constitution itself is marshaled as evidence as to the opinions of the framers on this issue. The presence of the 10th Amendment is a justification for holding the belief that strict construction was *intended* by the framers. For good measure, Bland also quotes Madison's 1791 opposition in hagiographical terms at the final point of positive argument, apparently believing that the opinion of the such a figure settles any lingering doubts as to the intent of the framers.¹⁰⁵

The argument that framer intention constricted constitutional interpretation to the mode of strict construction was picked up and expanded upon in a series of essays printed in the New York *Public Advertiser*. Writing under the pseudonym "Columbus" a correspondent to the paper prepared a string of articles that stretched throughout December 1810 and January 1811 and argued against a renewal of the Bank's charter. Throughout the essays "Columbus" makes reference to the framers and their intent elaborating a conception of the Constitution as the vehicle by which intentions regarding interpretation and substantive power were to be transmitted. In the earlier essays the author expounds the belief that the power to incorporate a bank is not within the constitutional scope of Congress. Relying on the argument that a strict construction of the powers granted leaves no room for the power of incorporation, "Columbus" suggests that it was thus the intention of the framers that no such power should be enjoyed by

¹⁰⁵ "This Assembly feels itself fortified in the interpretation which has given [sic] to the Constitution of the United States, when it recollects, that it has been solemnly declared by one of the most distinguished framers of that instrument, who now fills the highest station in the Union, "that a power to grant charter of incorporation had been proposed in the General Convention and REJECTED"."

Congress. However, as this argument develops over the course of the essays it becomes the more expansive claim that strict construction itself is the intent of the framers.

In the early essays, the author argues that framer intent points towards an interpretation of the Constitution that constrains congressional renewal of the Bank's charter. Attempting to link opposition to the Bank with the original intention that Congress should not have that power, he states:

“The framers of our inestimable constitution, in the amplification of the powers of that body, have not even intimated that they [Congress] might establish such institution [sic].”¹⁰⁶

Arguing that had the Convention desired that Congress have the power of incorporation “they would have especially noted their intention in some part of the constitution,” “Columbus” surmises that such a power can only be assumed under a doctrine of implied powers. To utilize such a doctrine would be to “baffle the best designs of the framers of the constitution...” and undermine liberty itself. Asserting congressional power in this area is to deny the significance of the fact that “in all... enumerated powers there is not an *iota* concerning the utility or necessity of a national Bank.” Simply put, “Columbus” argues that the lack of an explicit constitutional mandate in this area makes it impossible that those present in 1787 intended for Congress to have such a power.

However, in returning to the subject of the Bank's charter in January 1811 “Columbus” moves towards the elaboration of a wider reaching understanding of original intent. In two consecutive essays, printed on the 15th and 16th of January, “Columbus” restates his conviction that the Constitution does not grant Congress the authority to incorporate a bank. These articles move beyond merely showing that the power of incorporation was not considered however.

¹⁰⁶ “For the Public Advertiser,” *Public Advertiser*, December 24th 1810.

Instead, the correspondent articulates a theory of the Constitution in which the intent of the framers operates to bind future actors to interpreting the document in terms of strict construction alone. In the first of these articles “Columbus” seeks to contextualize the framers’ decisions within a social environment hostile to liberty. As such they worked to ensure that the Constitution left no space for the abuse of individual rights by accurately and concisely enumerating the powers that the national government would possess:

“The framers of our constitution had to contend with men not altogether the most friendly to the rights of the people; they however so far obtained their object as to define, with considerable accuracy the powers of both houses of congress...”¹⁰⁷

As such the Constitution is understood as a comprehensive and detailed textual record of the powers that each part of the national government was intended to possess. Establishing this point, “Columbus” takes the step of arguing that, as the Constitution was intended to be and is such a record, to engage in any form of interpretation aside from that of strict construction is to thwart the protections erected by the framers. That is to say that the very mode of interpretation is itself part of the process of political self-binding inherent in constitution making. Utilizing constitutional interpretations that enable the exercise of implied powers is to act against the intent of the framers:

“The framers of that striking monument of human wisdom and excellence, never entertained such an idea [broad construction]; they had long and well contemplated the defects of other governments and constitutions – and they were determined when they had finished their arduous [sic] labours, not to present their countrymen with a flimsy and rotten [sic] instrument.”

This theme was to be picked up once more in the following day’s newspaper and elaborated further. Beginning with the same notion that the Convention intended strict

¹⁰⁷ “For the Public Advertiser,” *Public Advertiser*, January 15th 1811.

construction in order that the Constitution might fulfill the role it was expected to play,¹⁰⁸ “Columbus” sought to argue that the Constitution itself provided evidence that this was the intention. Starting from the assumption that the framers entered into the task of drawing up a constitution with an approach marked by caution and deliberateness, the author argues that if they had intended for Congress to hold implied powers the framers would have given Congress the ability to engage in constitutional interpretation in order to identify those powers. The lack of such ability ought to be taken as firm evidence that no such activity was countenanced:

“Governments and constitutions long since crumbled into dust, taught them a salutary lesson... the members of the convention wisely refrained from grantin [sic] congress the right of construction, either expressly, or by implication.”¹⁰⁹

Moreover, the framers included a mechanism by which further powers might be granted to Congress in the event that the expressed powers proved to be too constraining:

“if congress are too limited in their powers for the general good... let them obtain those powers from an amendment to the constitution.”

The combination of a mechanism for obtaining further powers and a restriction on engagement in constitutional interpretation is understood by “Columbus” as compelling evidence that it was not the intention of the framers that anything other than strict construction be constitutional. As with the articles produced by Bland and “Harmodius,” framer intention is used to justify both the position that a national bank is unconstitutional and, increasingly, strict construction of the Constitution itself.

¹⁰⁸ “The renowned [sic] sages who framed our constitution understood the object for which they were called in convention: they never meant to send a constitution to the view of the world, which would render our liberties uncertain, and set them afloat to excite the unwarrantable ambition of demagogues and usurpers. No; they knew human nature too well, not to perceive the absolute necessity of making the provisions of that constitution as clear, and defined as carefully possible.” “For the Public Advertiser,” *Public Advertiser*, January 16th 1811.

¹⁰⁹ “For the Public Advertiser,” *Public Advertiser*, January 16th 1811.

However, within the arguments put forward by those authors opposed to the Bank was also a strand of constitutional interpretation that regarded the Constitution as a union of states. While the framers' intent was invoked to support a strict construction of the text, it was nevertheless the case that these discussions contain some sympathy with the idea that the states, as compacting parties to the Union, had some prior claim to the right of regulating banking institutions. Comprehensively laid out in "The Protest and Resolutions laid before the house of Representatives of Pennsylvania by Colonel Holgate," datelined as Philadelphia December 17th 1810 but reprinted in *The Enquirer* on the 29th December, this argument suggested that it was within the power of the states to solve constitutional problems.¹¹⁰ The document characterized the Constitution as "to all intents and purposes a treaty between sovereign powers," and thus:

"The interpretation of that instrument was, as in all other cases of compact, between parties having no common umpire, each party having equal right to determine for itself, not only as to infractions of the compact, but as to the kind of redress to which it would resort..."

From this, Colonel Holgate deduced that "it rests with the states to apply constitutional remedies."

Such an argument was touched upon in the articles produced by the strict constructionists,¹¹¹ and was hinted at when Vice-president Clinton defended his vote against the first section of the legislation renewing the Bank's charter on the basis that such a power was "a high attribute of sovereignty."¹¹² As this blend of state compact theory and strict construction suggests, it would be a mistake to characterize them as competing camps of thought within this debate. Often put forth in the same or subsequent sentences within an article, those opposed to

¹¹⁰ "Copy of the PROTEST and RESOLUTIONS laid before the house of Representatives of Pennsylvania by Colonel Holgate," *The Enquirer*, December 29th 1810.

¹¹¹ For example "Columbus" claimed that rechartering the Bank would be to "prostrate the sovereignty of the individual states in the dust." "For the Public Advertiser," *Public Advertiser*, December 24th 1810.

¹¹² "Washington City," *The National Intelligencer and Washington Advertiser*, February 23rd 1811.

the Bank seemed to regard states' rights as an aspect of the argument for a strict construction of the Constitution, justified by the intention of the framers that this be the case. This particular blend of arguments was particularly pronounced in the *New Hampshire Patriot* of 4th December 1810. Within an article entitled "Bank of the United States" that day's newspaper put forth that:

"The duties of the general government are explicit, and specified in the constitution: that body has no right to do *more* or *less* than is laid down in this grand directory and guide... where it assumes powers of legislation not expressly warranted in that instrument it encroaches on the rights of individual States – it usurps a power, against which the enlightened framers of the constitution were particular careful to guard, and for which many of the States, as individuals, were always jealous."¹¹³ (Original emphasis).

The characterization of the States as the individual parties to the Union, while the tying of a strict constructionist reading of the Constitution to the framers' intentions seems to place this article between the two interpretations of the Constitution discussed above. In truth however, this article is merely a particularly strong example of how the arguments came to be intertwined. "Columbus" would express concern for the States' sovereignty, while Holgate actively enlisted framer intent and strict construction in support of his argument. Stating that "it is notorious that such a right [of Congress to incorporate] was not intended to be given by the Convention who framed it," Holgate reiterated the common argument that such a right had been resounding rejected by the Convention:

"...it having been shown in the most authoritative manner that it not only never was *intended* to be given, but that the proposition to give it was negatived [sic] in the convention."¹¹⁴ (Original emphasis).

Strikingly, even as figures such as Holgate sought to argue for the Constitution as a compact of states, they made use of arguments that drew upon ideas of framer intent. Compared to the

¹¹³ "Bank of the United States," *New-Hampshire Patriot*, December 4th 1810.

¹¹⁴ "Copy of the PROTEST an RESOLUTIONS laid before the house of Representatives of Pennsylvania by Colonel Holgate," *The Enquirer*, December 29th 1810.

newspaper contributors of 1790-91 and 1800-01, the almost universal reliance on some form of framer intent in 1810-11 is remarkable – and nor was it constrained to those opposed to the re-chartering of the Bank.

Those in favor of renewing the Bank's charter had perhaps the stronger position in arguing for the constitutionality of such a position, given the precedent of the initial charter of 1791. As with the opponents of the Bank, they reached back to the constitutional arguments of 1790-91 as the basis of their case, and as with their opponents attempted to graft onto these arguments some notion of framer intent. As was the case in 1790-91 the central argument of the Bank's supporters was that the implied powers of Congress under the Constitution extended to the ability to incorporate a Bank. To these writers, without this power, in the words Edward St Loe Livermore, Congress "might as well go home, and wait for the people to make a new Constitution."¹¹⁵ Moreover, these correspondents argued, these powers had been in use for twenty years suggesting that their constitutionality had been well established. In a piece published in the *Connecticut Mirror* and reprinted in Philadelphia's *Poulson's American Daily Advertiser* in February, a supporter of the bank suggested that:

"...it would seem to follow, that the constitutionality of the Bank has been settled by the united voice of Congress, under various administrations, and, of course, by the various Presidents – by the legislatures of many, perhaps all the States, by the federal and state courts, and implicitly by the people, who have partaken in the operations and profits of the Bank for twenty years, without any effort to remove it on this ground."¹¹⁶

¹¹⁵ "To the Hon. Joseph Story, esq. Speaker of the house of Representatives of the Commonwealth of Massachusetts," *The Berkshire Reporter*, March 16th 1811.

¹¹⁶ "United States Bank," *Poulson's American Daily Advertiser*, February 20th 1811.

Such an argument may have appeared compelling,¹¹⁷ but the supporters of the Bank sought to place a particular emphasis on the support for the Bank that existed not over its twenty years of operation, but at the time of its inception. Key to their argument for the constitutionality of renewal was the claim that those who best understood the Constitution – those who took part in its creation – had understood the text to enable the incorporation of such an institution.

For the supporters of the Bank, the creation of it by the first congress, whose members intersected with those of the Philadelphia Convention, provided strong proof as to its constitutionality. Edward St. Loe Livermore argued that the first congress had regarded objections to the constitutionality of the Bank as “mere playful argument, not substantially founded” as was evidenced by their frequent engagement with the Bank in the form of legislative and fiscal activity. For St. Loe Livermore, “[t]hese facts seem to afford the highest proof that neither the president or Congress had any belief in the pretended objection of unconstitutionality.”¹¹⁸ Similarly, the article in *Poulson’s* sought to point out that those who created the Bank were most fully informed of the meaning of the Constitution. Tracking the passage of the Bank legislation, the author argued that the Senate that approved it had comprised of;

“members and distinguished members, of the Convention that framed the constitution, and of course must have known... what powers the instrument was intended to convey...”¹¹⁹

none of whom raised the point of constitutionality. True, this point was at issue in the House debate, but a final vote, “almost two to one in its favour,” with a majority composed of such

¹¹⁷ Although as the Bank’s charter was not initially renewed, they were right to assume more support for their position was needed.

¹¹⁸ “To the Hon. Joseph Story, esq. Speaker of the house of Representatives of the Commonwealth of Massachusetts,” *The Berkshire Reporter*, March 16th 1811.

¹¹⁹ “United States Bank,” *Poulson’s American Daily Advertiser*, February 20th 1811.

figures as Roger Sherman, Fisher Ames, and the anti-federalist Elbridge Gerry suggested that the expected bounds of the Constitution had not been breached. The presidential approval of Washington, whose “understanding always led him to the most correct conclusions” and who would never “have given his sanction to a measure which violated the Constitution”, provided assurance that the opposition to the Bank was purely a symptom of the “ambition of Mr. Jefferson and Mr. Madison.” Washington’s support of the Bank would also be seen as totemic by a writer in New York’s *Independent American*. The belief that the hallowed commander-in-chief could be mistaken on this point was dismissed with not a little contempt;

“...for none can believe, but what George Washington, at the time the Bank was established, as well understood the principles of the Constitution, and was as tender of its preservation, as the superannuated George Clinton, when he voted for its destruction.”¹²⁰

Finally, extending the conception of the framers to its widest scope, the contributor *Poulson’s* argued, that had all these actors been misguided or corrupted, the people themselves:

“having also a perfect knowledge of the powers granted to Congress in the Constitution which they had just formed and adopted, there was little room to fear a wilful, or mistaken departure in the public mind from the true spirit of that instrument.”¹²¹

As was the case with the opponents of the Bank in this period, the possibility of proving the intention and understanding of those closest to the Constitution was deemed the strongest manner in which to debate the constitutionality of an issue. While practice over twenty years might well have established a precedent of constitutionality for the National Bank, this was not the argument believed to most resonate within the printed public sphere. Instead, proof of the intention of those contemporary to the Constitution was the locus of debate – forcing Bank supporters to explain away Madison’s inconvenient opposition in 1790-91 without resorting to

¹²⁰ “United States’ Bank,” *The Independent American*, March 12th 1811.

¹²¹ “United States Bank,” *Poulson’s American Daily Advertiser*, February 20th 1811.

Elbridge Gerry's response that the intentions of those at Philadelphia in 1787 have no weight in later debates.

For both sides in 1810-11 the fundamental framework of constitutional debate had become that of proving that the framers intended a particular interpretation of their words and providing evidence to show what that intention was. However, the ideas of moving outside of the text that had been offered in 1800-01 were muted in 1810-11. While supporters of the Bank offered practice and the character of the founders as reasons to renew the charter, the opponents of the Bank saw those intentions as fundamentally linked to the constitutional text itself. The text was seen as the lodestar of constitutional meaning, and intention as an ideal was not wholly separable from it. That intention was utilized in this narrow way was indicative of a constitutional text not yet valued for the identity of its authors above all else. In the constitutional debates over Missouri, the text would still remain central to constitutional understandings.

The Admission of Missouri

In 1820 a question related to neither the Bank nor presidential elections saw constitutional interpretation once more a point of contention. The question of the admission of the Missouri territory as a State, wrapped up as it was in questions of sectional power, the morality of slavery, and the relationship between the original and new States, would ultimately be addressed through the infamous compromise that established a sectional balance of power enduring into the 1850s. The Compromise itself was thoroughly debated and resolved only after two sessions of Congress. It was said of Missouri's admission at the time "that a more grave and

portentous question had never been agitated” within Congress.¹²² Following the admission of Alabama as a slave State in 1819 and Illinois as a free State in 1818 the Union comprised twenty-two States, eleven free and eleven slave-holding. Debates regarding the admission of Missouri began in 1819 but ran aground after James Tallmadge attached an amendment in the House of Representatives to the needed bill requiring the manumission of children born to slaves after statehood upon reaching the age of twenty-five. In the following session, the Senate joined bills concerning the admission of Maine and Missouri, keeping the balance of free and slave States, and on 17th February 1820 agreed to forbid slavery north of 36° 30’.¹²³ Missouri entered the Union as a slave State alongside Maine, but not before the constitutionality of attaching conditions to the admission of States was debated within the print media. These debates saw recurrence to the notion that constitutional preservation was vital, and like the debates in 1810-11 indicated a willingness to understand that preservation as meaning the maintenance of the constitutional order envisioned by the framers. But to the extent that intent was a guide in application of the Constitution, actors in 1820 were committed to an ideal of the text itself as comprising the definitive record of intention. The text, rather than any non-textually derived notions of spirit or intent was the authoritative measure of constitutional meaning.

From the start of these debates, the importance of the issue of Missouri’s admission was recognized. The significance of the moment for the nation was signaled through references to it as the most pivotal debate since the adoption of the Constitution itself.¹²⁴ The sectional dimension of the conflict meant that the “Missouri question must necessarily excite warm

¹²² “The Missouri Question,” *Essex Register* (MA), February 26th 1820.

¹²³ *Annals of Congress*, Senate, 16th Congress Session 1, 428.

¹²⁴ For example cf. “Missouri Question,” *The Genius of Liberty*, February 8th 1820; “The Missouri Question No. 1,” *Boston Weekly Messenger*, December 2nd 1819, 114.

feelings” reasoned the editor of *The American*,¹²⁵ but the nature of the conflict meant more than that was at stake. A Virginian newspaper offered a poetic account of the debate’s importance:

“This knotty point e’er long must be decided,
On which the country is at large divided,
Whether Missouri is, or ought to be,
Like other states, entitled to be free —”¹²⁶

As this rhyme suggests, the intersection of western expansion and slavery was identified as the locus of this tension, and one not easily resolved. A report of the congressional debates unusually editorialized in parenthesis “[*Here the SLAVE question will come up*]” after reporting the introduction of a bill to accord Missouri statehood.¹²⁷ The constitutional stakes were twofold. Substantively at stake was the application of the Constitution to two issues that had bedeviled the 1787 Philadelphia Convention, the balance of the States and the existence of slavery. But equally the crisis was a test of the Constitution’s ability to absorb conflict over such issues within the legislative mechanisms of Washington, D.C. Senator Barbour described the question of Missouri as “The crisis... contemplated by the framers of the constitution... to guard against whose effects was the principal object of the creation of the Senate.”¹²⁸ Incorporating questions relating to the ultimate trajectory of the United States’ development as well as moral, material, local, and national interests, “The time” Barbour suggested, had arrived “which brings to the test the theory of the constitution.”¹²⁹ The debates over Missouri would, therefore, see the first attempts to resolve the conflicts that would ultimately pull the country apart in the 1860s within the framework of the Constitution. As the poem aptly continued

“For this decision fearful millions wait,
And trembling stand as on the brink of fate,

¹²⁵ *The American*, December 15th 1819.

¹²⁶ “Missouri Question,” *The Genius of Liberty*, February 8th 1820.

¹²⁷ “U.S. Congress,” *Massachusetts Spy, or Worcester Gazette*, December 22nd 1819.

¹²⁸ “Missouri Question,” *Norwich Courier*, February 9th 1820.

¹²⁹ “Missouri Question,” *Norwich Courier*, February 9th 1820.

While clashing eloquence, with portentous blaze,
A nation's interest in the cause displays.”¹³⁰

While the political actors of 1819 and 1820 certainly clashed over the constitutional conclusions reached, the newspaper debates are marked by broad agreement as to the nature of constitutional interpretation. In this moment there appeared widespread agreement that the text ought to be regarded as the touchstone of constitutional understanding. As was the case in 1810-11, the intention of the framers was emerging as an important rhetorical weapon, but it was firmly grounded in the idea that text was the definitive guide to such intent, and that the text in the final analysis was authoritative over any non-textual supports. In contrast to the modes of constitutional argumentation that we shall see deployed with regard to slavery in the 1830s, and in keeping with the falling away of the “spirit of the Constitution” arguments seen in 1800-01, the debates over Missouri were marked by a reliance on the text.

Advocates of Missouri's admission with a restriction on slavery made the Constitution the basis of their position and deployed highly textual understandings of the Constitution to that effect. Looking to Congress's powers over the territories and their admission, opponents of slavery urged restrictions on the basis that “Congress shall have Power to dispose of, and make all needful Rules and Regulations respecting the territory and other Property of the United States,”¹³¹ and that these powers included the restriction of slavery. A significant actor within the debates over the admission of Missouri, Rufus King gave two speeches in late 1819 that were edited and circulated for popular reprint. In this popularized version of his Senate speeches, King offered a view of constitutional interpretation that was firmly located in the text. For King it was the case that “in the language of the constitution, Missouri is [Congress's] territory, or property, and is subject...to the regulations and temporary government, which has been, or shall be

¹³⁰ “Missouri Question,” *The Genius of Liberty*, February 8th 1820.

¹³¹ Article IV, Section 3, U.S. Constitution.

prescribed by congress.”¹³² Defending this position, King provided a view founded in the plain reading of the constitutional document; “The clause of the constitution, which grants this power to congress, is so comprehensive, and unambiguous, and its purpose so manifest, that commentary will not render the power, or the object of its establishment, more explicit or plain.”¹³³ The clause undoubtedly gave authority over the territories to Congress, in the eyes of those seeking to restrict slavery. To assess whether this authority extended to forbidding slavery as a condition of admission to the Union they turned elsewhere in the Constitution.

The second important clause for this argument was that concerned with the potential for regulation of the slave trade after 1808. The advocates of restriction looked to the Constitution’s provision that “the Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year eighteen hundred and eight,” in order to show that the Constitution did indeed grant Congress regulatory powers over the movement of slaves.¹³⁴ Crucial to this argument was the use of “migration” and “importation” in the clause. Assuming that there was no excessive wording in the Constitution, opponents of slavery argued that “migration” must denote movement distinct from “importation.” On this textual arrangement their argument hung. Writing in the *Baltimore Patriot*, “W.W.H.” outlined the claims; “...it is a rule of construction, that a statute (and the Constitution is a statute) ought upon the whole to be so construed, that if it be possible, no clause, sentence or word shall be superfluous, void, or insignificant.”¹³⁵ Given to understand the text in this manner, he or she concluded “that migration is not a mere expletive to round a period; but a substantive term, signifying a distinct idea.” As such the clause ought to read as giving

¹³² “Missouri Question,” *Hampden Federalist & Public Journal*, December 8th 1819.

¹³³ “Missouri Question,” *Hampden Federalist & Public Journal*, December 8th 1819.

¹³⁴ Article I, Section 9, U.S. Constitution.

¹³⁵ “Missouri Question,” *Baltimore Patriot & Mercantile Advertiser*, January 26th 1820.

Congress the power to regulate the importation *and* migration of slaves after 1808. As Missouri could only be populated with slaves through their migration into that territory or State, W.W.H. argued that the congressional restriction of slavery was implicitly constitutional.

Other writers constructed similar arguments on the basis of these two clauses. An extended consideration of the issue in the *Boston Weekly Messenger* drew the same conclusions. Sidestepping the question of whether the guarantee of republican government provided a constitutional basis for restriction, the Boston writer argued that there was “a clause in the Constitution which settles the question” of Missouri.¹³⁶ This was, as for W.W.H., the slave trade clause. Noting the inclusion of migration as well as importation, the author claimed that it showed “that the constitution not only contemplated the abolition of external but *internal* trade, in slaves.”¹³⁷ But this writer extended his/her textual analysis beyond that of the *Baltimore Patriot*’s correspondent; “But secondly, the Congress was only restricted from forbidding before 1808, the importation and the migration of such persons, as the states *then existing*, chose to admit.”¹³⁸ As Missouri was not one of the original States, there was no barrier to regulating its slave trade as condition of admission. In a manner that was repeated elsewhere, the author went further to prove that this was the intent of the text, by allying the interpretation with the practice exhibited by those involved in the Constitution’s creation, in this instance through the actions concerned with the admission of Ohio. Grounded in the “ante-constitutional” provisions of the North-West Ordinance, it showed how the powers of Congress were understood at that earlier time. Pointing to the Ordinance’s ban on slavery within the territories, the author noted that this was “precisely the first part of Mr. Tallmadge’s amendment.”¹³⁹ Here the express text of the

¹³⁶ “No. III - The Question of Right Considered,” *Boston Weekly Messenger*, December 2nd 1819, 118.

¹³⁷ “No. III - The Question of Right Considered,” *Boston Weekly Messenger*, December 2nd 1819, 118.

¹³⁸ “No. III - The Question of Right Considered,” *Boston Weekly Messenger*, December 2nd 1819, 118.

¹³⁹ “No. III - The Question of Right Considered,” *Boston Weekly Messenger*, December 2nd 1819, 119.

Constitution was seen as perfectly in accord with the intentions of the document. The Boston writer would later suggest that “if there were any doubt, what the principles and spirit of that constitution be, its express provisions are decisive.”¹⁴⁰ As this quote suggests, the writer understood the Constitution as a record of intent; the words themselves could be turned to and parsed when the meaning of the Constitution was in doubt, which is to say, that there exists a definitive meaning which the words seek to capture, rather than one which is brought into being by them. The power of the text was that it was an extant expression of the commitments of those active in 1787-88.

Reprints of Senator Mellen’s remarks on the issue showed him constructing a similar argument from the text of Constitution, “inferences drawn from the celebrated ordinance of 1787,” and the Louisiana Treaty in order to reach a different, but supportive, conclusion. Making the same distinction between “importation” and “migration,” and placing a similar emphasis on “existing,” Mellen concluded that the understanding of the Constitution that should be advanced was the one that protected “those rights or principles which it was intended to preserve inviolate.” As the Louisiana Purchase had not been envisaged by the framers, regulation of its admission was perfectly within the powers of Congress — all that mattered was that the Constitution bequeathed this authority to Congress.¹⁴¹ Nonetheless, in reaching this conclusion, he noted “All compacts are to be construed according to their subject matter; in reference to the state of things to which they relate.”¹⁴² The possibility of a gap between intention and text tentatively explored in 1800-01 and fully embraced by the South in the 1830s was not countenanced here. For Mellon, the environment within which the constitutional text was framed

¹⁴⁰ “The Missouri Question. No. IV,” *Boston Weekly Messenger*, December 2nd 1819, 125.

¹⁴¹ “Debate In the Senate of the United States, On The Missouri Question,” *American Beacon and Norfolk & Portsmouth Daily Advertiser*, February 2nd 1820.

¹⁴² “Debate In the Senate of the United States, On The Missouri Question,” *American Beacon and Norfolk & Portsmouth Daily Advertiser*, February 2nd 1820.

offers a way of understanding the text more thoroughly. Like W.W.H., the text is an expression of intent, but one that aligns perfectly. There is no scope here for finding the text incomplete (as in 1800), nor imperfectly expressing the intentions behind it (as in the 1830s). Instead, as in 1810-11, text and intention as closely related, if not fully identical.

In this vein, a correspondent to the *New-Hampshire Sentinel* would construct an argument that saw a perfect identity between the text and the intention of the framers. Detailing the commitments of the preamble and context in which the framers worked before taking up the use of migration and importation, “W. G.” would claim that the relevant “clause of the Constitution sufficiently indicates the feelings of the sages who formed it, while its meaning is too obvious to be mistaken.”¹⁴³ Its inclusion was, the writer argued, inserted as a “check [upon] the further inroads of a system at war with the very principles they [the framers] had long been struggling to maintain, and in direct violation of all they held most dear.”¹⁴⁴ Americans would be acting in “obedience to the injunctions of “the Father of his country” in seeking a restriction upon slavery. Restriction was in line with the intentions of the republic’s fathers, as expressed in the Constitution.

Citizens of New York likewise offered their faith in the founders as a basis for supporting the restriction of slavery. Citing the argument, offered by opponents of restriction, that the only condition upon admission possible under the Constitution was a guarantee of republican government, these citizens conceded “If this inference were true, we should submit in silence but with sorrow.”¹⁴⁵ Such an outcome would mean that “the great and good men who framed the constitution, had in this particular lost not only their moral sentiments, but their political

¹⁴³ “The Missouri Question,” *New-Hampshire Sentinel*, January 1st 1820.

¹⁴⁴ “The Missouri Question,” *New-Hampshire Sentinel*, January 1st 1820.

¹⁴⁵ “Missouri Slave Question,” *The Illinois Intelligencer*, December 29th, 1819.

forecast” and had failed to equip the Constitution with the ability to ensure justice.¹⁴⁶ However they were relieved to state that the framers “were not thus blind,” and therefore included provisions to make possible the end of importation and migration of slaves and exercised this authority over the Northwest Territory in 1789 and the Mississippi Territory in 1793.¹⁴⁷ Such acts gave the New Yorkers confidence that “it is within the *constitutional* power of Congress to prohibit the introduction of slavery into any of the new states or territories.”¹⁴⁸ Once more, text was allied with presumed intention in order to derive constitutional meaning.

Opponents of the restriction likewise turned to the Constitution in their arguments. For some, its mere invocation settled the argument, for example in Senator Barbour’s speech noted above: “We are pledged by the most solemn sanctions of our religion, to reject the meditated restriction on Missouri: the constitution, which we have sworn to support, forbids it.”¹⁴⁹ Others went deeper into questions of constitutional interpretation, either in placing emphasis on the text alone or as with the advocates of restriction in linking the text to intent. Rejecting the possibility of restriction as the setting of a dangerous precedent of congressional power, one critic approvingly noted Missouri’s unwillingness to “admit a *construction* either of the treaty of cession, or of the Constitution, which is in direct contradiction to the *words of it*.”¹⁵⁰ Denying the legitimacy of non-textual interpretations, the author stated “nothing is more fatal in government, than a *constructive legislation*, a “*looking behind the records*,” for when this mode is once adopted, and acknowledged, there is danger that the express meaning of the national compact

¹⁴⁶ “Missouri Slave Question,” *The Illinois Intelligencer*, December 29th, 1819.

¹⁴⁷ “Missouri Slave Question,” *The Illinois Intelligencer*, December 29th, 1819.

¹⁴⁸ “Missouri Slave Question,” *The Illinois Intelligencer*, December 29th, 1819.

¹⁴⁹ “Missouri Question,” *Norwich Courier*, February 9th 1820.

¹⁵⁰ “A candid statement of the Missouri question,” *Boston Patriot & Daily Mercantile Advertiser*, December 10th 1819.

will be lost in the preponderancy of party.”¹⁵¹ Such worries chimed with the concerns expressed in Rhode-Island, that the “only safeguard of our liberty is a scrupulous fidelity to the principles of our Constitution.”¹⁵² Worried of the dangers arising “whenever attempts are made to impose new constructions upon the Constitution,” this writer voiced an opinion that allowing questions over the meaning of precepts invited “sophistical construction[s]” and struck a blow to “that feeling of reverence, which is the safeguard of all institutions.”¹⁵³

Others though, saw the text and the intentions behind it in unison. Writing in the *Richmond Enquirer*, “A Southron” disputed the interpretation placed upon the Constitution by the opponents of slavery, but not the modes of interpretation utilized. Taking as a starting point the intent of the Constitution, “A Southron” posited “If there was a subject of peculiar anxiety among the states at the time of the adoption of the constitution, it was to retain in their own hands the power of regulating their own municipal affairs.”¹⁵⁴ Read in this light, the “object... of the constitution was to *enable* Congress to *prevent* restrictions and prohibitions, not to authorize it to *impose* them.”¹⁵⁵ The meaning of the Constitution then was “plain and palpable,” and the relevant clause was that regarding commerce between the States.¹⁵⁶ Providing a reading of that clause that clearly sacrificed the text-alone to the text-as-intent, “A Southron” argued that existence of a power to *regulate* interstate commerce denoted a power to *promote* it and not in any way to restrict it. Any other understanding was “contrary to the plain meaning of the clause”¹⁵⁷ — which we might take to mean the intention behind the clause, as a power of

¹⁵¹ “A candid statement of the Missouri question,” *Boston Patriot & Daily Mercantile Advertiser*, December 10th 1819.

¹⁵² “The Constitution,” *Rhode-Island American, and General Advertiser*, January 14th 1820.

¹⁵³ “The Constitution,” *Rhode-Island American, and General Advertiser*, January 14th 1820.

¹⁵⁴ “Missouri Question,” *Richmond Enquirer*, January 20th 1820.

¹⁵⁵ “Missouri Question,” *Richmond Enquirer*, January 20th 1820.

¹⁵⁶ “Missouri Question,” *Richmond Enquirer*, January 20th 1820.

¹⁵⁷ “Missouri Question,” *Richmond Enquirer*, January 20th 1820.

regulation denotes, on its face, a power to restrict. Opponents of restriction in the North also shared this interpretative view. “A Friend to America,” argued that “If the people had intended to have given any further powers to Congress [regarding conditions of admission]... one would suppose it would be found in the Constitution.”¹⁵⁸ Linking text and intent, the writer claimed “The Constitution is a limited compact, possessing powers expressed therein... The design of the Union was for foreign purposes... and it was never contemplated there should be an inequality of privileges or restraints among the states.”¹⁵⁹ In Virginia, the House of Delegates issued a Preamble and Resolutions on the constitutionality of restriction. Taking the Tenth Amendment¹⁶⁰ as their constitutional clause *de jour*, the House argued that its meaning ought to be derived through “reference to that instrument [the Constitution].”¹⁶¹ As the rights protected in the Tenth Amendment must, they suggested, be universal, they only need show that the original parties to the federal compact had not ceded control over slavery to prove that Congress had no power to restrict slavery in Missouri.

Conclusion

The newspapers examined above suggest that while the intent of the framers’ played little part in the popular constitutional debates of the first years of the republic, it was only a short time before this approach to constitutional interpretation became mainstream. While the newspaper correspondents engaged in debate over the constitutionality of the Bank in 1790-91 would restrict their exchanges to question of textual meaning, reaffirming the characterization of

¹⁵⁸ “The Missouri Question,” *Independent Chronicle & Boston Patriot*, January 12th 1820.

¹⁵⁹ “The Missouri Question,” *Independent Chronicle & Boston Patriot*, January 12th 1820.

¹⁶⁰ The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

¹⁶¹ “Virginia Legislature,” *Carolina Centinel*, January 22nd, 1820.

the Constitution as a textual document created and owned by the people in their entirety, only ten years later a more expansive discussion would be held. With the constitutional crisis of 1800-01 a fertile environment in which new and innovative approaches to interpretation would emerge, some advancing its popular authorship and others providing a vision of the Constitution which would work to restrict its ability to respond to democratic impulses. The radically democratic approaches to constitutional interpretation offered by the republican correspondents would in some respects foreshadow the constitutional theories that gained acceptance in the middle third of the twentieth century. Addressing complex and inherent problems of constitutional democracy, these writers offered an understanding of the Constitution that allowed for organic change driven by popular sentiment. Imbuing the Constitution with a “spirit” and emphasizing its democratic nature, these writers would turn not to the framers, but to the people themselves for guidance. The contributions of “An American,” “A respectable citizen,” and “Aristides,” offered the possibility of developing an understanding of the Constitution which would energize the popular will within American politics, rather than constrain the actions of government. However, the same debate would call forth a more restrictive approach to interpretation, which played down the popular mandate of the Constitution and stressed the detachment and completeness of the constitutional document. The Federalist writers of Washington were crafting a competing notion of the Constitution that would enshrine it as a curb on democratic excess by emphasizing its holistic perfection and fashion its interpretation as a pursuit of the legal profession. Twisting the underlying motivation of the Constitution text as being without author, they would detach it from the popular will and conceive of it as a text without editor.

Bouton, in his recent book on the American Revolution in Pennsylvania, has claimed that the period leading up until 1800 was one in which democratic impulses of the Revolution were

tamed.¹⁶² Despite this, the constitutional debates of 1800-01 suggest that if democratic agency was being undermined during this period, it was still a viable form of constitutional understanding. However, as the exchanges regarding the rechartering of the Bank in 1801-11 show, it would not be this strain of constitutional thought which would ultimately come to dominant with the popular imagination. Instead as the period progressed, the importance of the constitutional text as a record of intent would grow. In both 1810-11 and 1819-20, correspondents within newspaper debates would turn to the text as a definitive record of the meaning of the Constitution. In doing so, they intertwined the ideas of intention and text to the point that a gap between the two was reduced to a theoretical rather than actual possibility.

This chapter, as was suggested in the introduction, has set its sights only on attempting to survey the development of constitutional interpretation within newspapers between 1790 and 1820. As such, it has left open the question of why such a shift took place (although an explanation may have been hinted at during some discussions). This question is perhaps more crucial for American self-understanding than the issue of when and how the shift took place. An understanding of why American politics came to be straitjacketed into a Constitution drawn up for the Eighteenth century is not intuitive, especially when the framers themselves, particularly Madison and Jefferson (always something of an honorary framer) seemed so committed that it should not be. Understanding the intertwining of text and framer intention in the 1800s, and its relationship to changing social norms and expectations in the same period, is of not insignificant importance to American politics today. Existing within a society that finds itself bound to and confronted with a Constitution crafted in the 1780s, the American arena of politics is constrained institutionally and conceptually. Identifying why such a situation has come to be is a vital in

¹⁶² Terry Bouton, *Taming Democracy: "The People", the Founders, and the Troubled Ending of the American Revolution* (Oxford: Oxford University Press, 2007).

seeking to return the ownership of the Constitution to the People themselves. As such the documenting of the when and how of the shift can only be regarded as the first step – and so the dissertation turns now to the question of why this shift took place.

Chapter 2: Authorship and the Constitution

“...there is a somewhat alarming tendency in this country, to resist the settlement of constitutional questions ; to embalm doubts in everlasting preservation ; to sacrifice history, practice, authority, and acquiescence, to the contested letter of the text...”¹⁶³

Constitutional theorists since the Constitution’s bicentennial have placed emphasis upon the people’s role in the creation of constitutional authority during the founding period. For progressives, initially in the form of the republican revival and subsequently in the guise of popular constitutionalism, the people’s authorization provides scope for contemporary constitutional constructions.¹⁶⁴ For originalists, the people’s authority gives democratic sanctity to the constitutional text as an objective restriction on policy.¹⁶⁵ To the extent that the people’s role in the creation of the Constitution has been emphasized, the framers’ role in that process has been increasingly marginalized. The people’s grant of authority has become conflated with an imputation of meaning, such that the understanding of the ratifiers now guides, to differing degrees, the interpretative endeavors of both popular constitutionalists and originalists. This chapter, in tracing the creation of the constitutional text’s authority, argues for a more complex understanding – one in which the role of the framers as authors is a more pronounced part of the ratification process. Pauline Maier has recently suggested that the public see the founding as only

¹⁶³ “ART. III – Story’s Constitutional Law”, *The North American Review* 38, (January 1834): 65.

¹⁶⁴ For example Cass R. Sunstein, “Beyond the Republican Revival,” *The Yale Law Review* 97 (1988); Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford: Oxford University Press, 2004); Barry Friedman, *The Will of the People*, (New York: Farrar, Straus and Giroux, 2009); Scott D. Gerber, “The Republican Revival in American Constitutional Theory,” *Political Research Quarterly* 47 (1994).

¹⁶⁵ Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law*, (Princeton: Princeton University Press, 1997); Keith E. Whittington, *Constitutional Interpretation: Textual Meanings, Original Intent, and Judicial Review*, (Lawrence, KS: University Press of Kansas, 1999); Jack M. Balkin, *Living Originalism*, (Harvard: The Belknap Press of Harvard University Press, 2011).

the Philadelphia Convention, ignoring – or ignorant of – the process of ratification.¹⁶⁶ Conceptually, constitutional scholars are perhaps increasingly guilty of the converse sin of seeing the founding only in the moment of ratification.

Showing that the defenders of the proposed constitution initially divided over the significance of the Philadelphia Convention's authorship of the constitutional text, this chapter explores the manner in which claims of the convention's authorship became a strategic necessity in light of Anti-federalist demands for amendment of the text prior to ratification. Faced with the prospect of each state offering contradictory amendments as a basis for ratification, some Federalists¹⁶⁷ argued that only the Philadelphia Convention could author an acceptable constitution – and that attempts at amendment of the constitution after its issuance by the Philadelphia Convention but prior to ratification by the states (“prior amendment”) would undermine the unity of the document and deny the authorial authority of the Convention vis-à-vis the text. By tapping the authority that authors exert upon their texts, these Federalists were able to secure ratification, and crucially ratification without prior amendment. Conceiving ratification

¹⁶⁶ Pauline Maier, *Ratification: The People Debate the Constitution, 1787-1788*, (New York: Simon & Schuster, 2010). Maier despondently notes her suspicion that “most Americans think George Washington was inaugurated a week or two after the Convention, if they think about it at all. They assume ratification was automatic, which it was not” (x).

¹⁶⁷ In using “Federalist” I refer throughout the essay to the proponents of the proposed constitution, and not the subsequent political party. As the Federalists of the ratification debates were in some senses as divergent in their opinions as the opposing Anti-federalists, I use this term for convenience rather than to denote a coherence and uniformity of thought amongst this group. It was certainly not the case that all Federalists sought to advance claims of authorship. See for example James Iredell's refusal to accept the proposed Constitution “by a blind admiration” of those who produced it (James Iredell, “Address to the Freemen of Edenton,” March 28th-29th 1788, *DHRC digital*). Moreover, Federalist arguments in favor of the Convention's authority were usually made behind the safety of pseudonyms, perhaps in light of the potential charge of aristocratic pretensions. Archibald MacLaine, for example, offered a strong articulation of the people's authority in his state's convention (see below), while as “Publicola” sneered that had they not been misled, “those among you, who have little or no means of information but from your wealthy, or dignified neighbours, would not at this day have raised your voices against a work that does honour, even to the most celebrated of those names who assisted in forming it” (Publicola, “An Address to the Freemen of North Carolina,” March 20th 1788, *DHRC digital*).

not as the moment of founding but as the culmination of it, they saw the relationship between the framers and the people as structured around a two-step model of constitutional creation, in which proposal of a document was followed by its ratification. Commitment to this model created a role for the framers as textual authors of the Constitution within the liminal period between proposal and ratification.

This initial invocation of the authorial authority of the framers would have profound consequences however. Post-ratification, these claims took on greater significance within a society transitioning from a republican to a liberal conception of authorial authority.¹⁶⁸ Alongside a growing acceptance of the idea of textual fallibility, and therefore the need to subject the Constitution to interpretation, this trend made questions of constitutional authorship pertinent. In this setting, the seed of Philadelphia Convention authorship planted in the midst of

¹⁶⁸ On the emergence of the author figure cf. Martha Woodmansee & Peter Jaszi (eds.), *The Construction of Authorship: Textual Appropriation in Law and Literature*, (Durham: Duke University Press, 1994); Stephen B. Dobranski, “The Birth of the Author: The Origins of Early Modern Printed Authority” in *Authority Matters: Rethinking the Theory and Practice of Authorship*, eds. Stephen Donovan, Danuta Fjellestad and Rolf Lundén, (New York: Rodopi, 2008); Martha Woodmansee, “The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the Author”, *Eighteenth-Century Studies* 17 (Summer 1984); Trevor Ross, “Copyright and the Invention of Tradition” *Eighteenth-Century Studies* 26 (Autumn 1992); Lyman Ray Patterson, *Copyright in Historical Perspective*, (Nashville: Vanderbilt University Press, 1968). On the English debates cf. Mark Rose, “The Author as Proprietor: *Donaldson v. Becket* and the Genealogy of Modern Authorship”, *Representations* 23 (Summer 1988). For the North American context cf. William Charvat, *Literary Publishing in America 1790-1850*, (Philadelphia: University of Pennsylvania Press, 1959); John Tebbel, *Between Covers: The Rise and Transformation of Book Publishing in America*, (New York: Oxford University Press, 1987); James N. Green, “The British Book in North America, 1695-1830” in *The Cambridge History of the Book in Britain: Volume 5, 1695-1830*, ed. Michael F. Suarez & Michael L. Turner, (Cambridge: Cambridge University Press, 2009); Tyler T. Ochoa and Mark Rose, “The Anti-monopoly Origins of the Patent and Copyright Clause”, *Journal of the Copyright Society of the U.S.A.* 49 (2002). On the print culture of the early Republic cf. Trish Loughran, *The Republic in Print: Print Culture in the Age of U.S. Nation Building, 1770-1870*, (New York: Columbia University Press, 2007); Jeffrey L. Pasley, “*The Tyranny of Printers*”: *Newspaper Politics in the Early American Republic*, (Charlottesville: University Press of Virginia, 2001); Meredith L. McGill, *American Literature and the Culture of Reprinting, 1834-1853*, (Philadelphia: University of Pennsylvania, 2003); Larzer Ziff, *Writing in the New Nation: Prose, Print, and Politics in the Early United States*, (New Haven: Yale University Press, 1991); Melissa J. Homestead, *American Women and Literary Property, 1822-1869*, (New York: Cambridge University Press, 2005).

the debates over ratification grew into a robust tree of framer intention by the 1830s.¹⁶⁹ As it did so, the dynamic, democratic constitution envisaged by the above noted Democratic writers of 1800-01 calcified into a framer-orientated constitution that would restrict the expansive democratic promise of the founding.

In order to explore these developments, the chapter examines the debates over the Constitution that took place in 1787-88. Particular attention is paid to the writings of Alexander Contee Hanson, John Jay, and James Madison, where an understanding of ratification in which the framers assumed authority for the text prior to popular assent is expressed. Here then, the Constitution – and its subsequent interpretation – emerges under the initial, sole authority of the framers before being transferred to the people. On this basis, I argue that accounts that stress the popular nature of ratification at the expense of the role of the framers mischaracterize the position of the Constitution in 1787-88. The chapter then briefly turns to the development of this authority within the legal commentaries of the early Republic in order to show (1) how authorial claims became increasingly important within the cultural understanding of texts, and (2) the manner in which particular authorial claims of the framers developed. Subsequent chapters will provide additional analysis of this tendency through examination of the causes, consequences, and developments allied to it.

A Textual Constitution

Michael Warner's consideration of the Constitution's textual nature, in his *Letters of the Republic*, emphasizes the printed nature of the document. Drawing upon the republican print

¹⁶⁹ For a fuller discussion of this see Chapter Five of the dissertation.

culture of late Eighteenth century America, Warner suggests that the very printed form of the Constitution contributed towards its acceptance as the people's document.¹⁷⁰ Highlighting the emphasis placed on the "impersonality of public discourse" within colonial society,¹⁷¹ Warner suggests that the association of virtue with disinterestedness enabled anonymous printed arguments to come to be regarded as legitimate, and moreover *the* legitimate, contributions to colonial public debate. Within this conceptual setting the establishment of a constitution in the form of a printed document provided a novel way to address a fundamental democratic problem; How can a political community/order be formed that was both consented to and created by the people before their existence is made manifest by that order? The solution as described by Warner was ratification of a document drawn up not by a constituted authority, but through an extralegal process in which an impersonal, and therefore universally owned, text became the "original embodiment of the people."¹⁷² A document that emanated from no one, the Constitution interpellated the whole, the people themselves. In Warner's words, "the printedness of the Constitution not only underwrites, so to speak, the popular authorship of the Constitution – it summons the readership of the print audience to recertify it continually and universally."¹⁷³

Despite the rich republican print culture that Warner has depicted as a basis for the Constitution emanating from no one, and therefore the people, the actors in the events of 1787-1788 saw authorship of the Constitution as a central issue. Indeed many Federalists, preoccupied with questions of authorship, strove to depict themselves not as authors of the document, but rather characterized their relationship to the text in the manner that Roland Barthes has defined

¹⁷⁰ Michael Warner, *The Letters of the Republic: Publication and the Public Sphere in Eighteenth-Century America*, (Cambridge, MA: Harvard University Press, 1990).

¹⁷¹ Warner, *Letters of the Republic*, 38.

¹⁷² Warner, *Letters of the Republic*, 102.

¹⁷³ Warner, *Letters of the Republic*, 110.

as being writers.¹⁷⁴ For while authors claim ownership over the text and forge a relationship of authority over it, writers act as scribes for another authority – they write not for themselves but under the commission or authority of some other entity. In the words of Barthes, they are “clerks.”¹⁷⁵ Drawing parallels between their own actions and those of “obscure individuals” and “private pens,” Federalists in this mold emphasized their limited authority regarding the Constitution.

However, while some Federalists mobilized the rhetoric of non-authorship to emphasize the people’s authority over the text, others simultaneously traded upon the personal authority of members of the Philadelphia Convention in order to ensure ratification. Without a central locus of authority to underpin the text and ensure its integrity, the Federalists had no coherent response to challenges from opponents that they allow the people to amend the document prior to ratification, either through state conventions or through a second national convention. By tapping the authority that authors exert upon their texts in the form of authorial intent, the Federalists were able to secure ratification, and crucially ratification without prior amendment.

The two-step process of constitutional creation enabled an invocation of authorial intent. Without a mechanism under which the “wisest men” of America, meeting at Philadelphia, had an authoritative linkage to the document, they would have been unable to do more than endorse it.¹⁷⁶ Participation in the Philadelphia Convention enabled them to claim it as their own, and forge a relationship of authorship with it. From this base of authorship they could assert correct interpretation, denying the strength of criticisms, and place their own personal authority *behind*,

¹⁷⁴ Roland Barthes, “Authors and Writers,” in *Roland Barthes, A Barthes Reader*, ed. Susan Sontag, (New York: Hill and Wang, 1982).

¹⁷⁵ Barthes, “Authors and Writers,” 190.

¹⁷⁶ “Honorius” in *Independent Chronicle*, January 3rd, 1788 in *DHRC digital*.

not merely alongside, the Constitution. By positioning themselves as authors, they could hope to encourage views similar to that expressed by “A Native of Virginia”:

“If we read the proposed plan under these ideas, and think we discover imperfections, and faults; ought we not rather distrust our own perceptions, than the understandings of its makers? Because, it is much more probable, that a single reader, even of great capacity, should be mistaken, than that so respectable a body as the Convention, with minds enlightened, and more unbiased, should, after the freest and fullest investigation of this important subject, be wrong.”¹⁷⁷

But the two-step process also created the need for a particular authority during the liminal period following the writing of the constitutional document and before its ratification by the people. In this temporal space, the document existed without legal sanction, but required unity. To remain intact for the duration of the ratification process it required an authority behind it so that amendment and revision by each separate state, under the authority of the people, did not produce its own version – a result that would render no single legal, or even usable, constitution. The Federalists required an originary authority for the document that could render amendment prior to ratification illegitimate. Authorship provided this, linking the framers’ personal authority to the as-written document.

However in mobilizing authorship the Federalist that advanced these claims displaced the authority of the people for the text that they and other Federalists emphasized elsewhere. In locating a first, albeit temporary, authority in their authorial identity, Federalists such as Madison, Jay, and Contee Hanson lodged the basis for textual authority in themselves, *not the people*. If it was through ratification that the Constitution was made legitimate, it was through authorship that it was given textual cohesion.

¹⁷⁷ “A Native of Virginia: Observations upon the Proposed Plan of Federal Government,” 1788 in *DHRC digital*.

Writership and the Textual Constitution

Beginning with the Pennsylvania convention and under James Wilson's initial leadership, Federalists worked to depict the framers as engaged only in writership, not authorship. Stressing that the people were the authority behind the Constitution,¹⁷⁸ Wilson would state that:

"This Constitution, Mr. President, opens with a solemn and practical recognition of that principle: - "We, the *people of the United States* [...] do ordain and establish this Constitution for the United States of America." It is announced in *their* name – it receives its political existence from *their* authority: they ordain and establish."¹⁷⁹

¹⁷⁸ The Federalist commitment to popular sovereignty in the form of the people's authorization of the constitutional document was not mere persuasive rhetoric. As Christian G. Fritz notes, the Federalists "relied on the people as the collective sovereign to overcome the procedural obstacles in bringing the federal Constitution into being." Christian G. Fritz, *American Sovereigns: The People and America's Constitutional Tradition Before the Civil War*, (New York: Cambridge University Press, 2008), 138; see also Jason Frank, *Constituent Moments: Enacting the People in Postrevolutionary America*, (Durham: Duke University Press, 2010), 26. It was at least partly for this reason that James Madison urged ratification by the people-in-the-states:

"To give a new System its proper validity and energy, a ratification must be obtained from the people, and not merely from the ordinary authority of the Legislatures. This will be the more essential as inroads on the *existing Constitutions* of the States will be unavoidable." (James Madison, "Letter to George Washington," April 16th, 1787, in *PJM digital*. Original emphasis).

The commitment to the People's ultimate authority was more than a strategic response to questions of legal process. It also reflected a strong belief that sovereignty resided in the People and that only through a process of ratification could the new Constitution be regarded as a supreme law. Writing to Edmund Pendleton prior to the meeting of the Philadelphia Convention, Madison expanded upon his earlier thoughts that a necessity would be "produced by the encroachments on the State Constitutions, of obtaining not merely the assent of the Legislatures, but the ratification of the people themselves." He further reasoned however, that even

"if such encroachments could be avoided, a higher sanction than the Legislative authority would be necessary to render the laws of the Confederacy paramount to the Acts of its members" (James Madison, "Letter to Edmund Pendleton," April 22nd, 1787, in *PJM digital*).

Only by tapping the sovereignty of the People directly through the process of ratification could the new Constitution be deemed authoritative. Working to locate authority for an extralegal re-constitution in the People, the Federalists were committed themselves to the notion that "We, the people" gave the Constitution its authority.

¹⁷⁹ *Debates II*, 434-435.

Articulating the defense of the Philadelphia Convention that it had only engaged in “proposing” a new constitution, Wilson would move to assert the limited ambitions of the Convention in the limited terms of writing: “I think the late Convention has done nothing beyond their powers. The fact is, they have exercised no power at all, and, in point of validity, this Constitution, proposed by them for the government of the United States, *claims no more than a production of the same nature would claim, flowing from a private pen.*”¹⁸⁰ In Wilson’s account the people authorized the document: “By their *fiat*, it will become of value and authority; without it, it will never receive the character of authenticity and power.”¹⁸¹

In the course of ratification convention debates, Wilson’s model of framing the Philadelphia Convention’s role as one of draftsmanship would be recurrent. In Virginia, Patrick Henry’s demand on behalf of the people stimulated an ensuing discussion that fell along two, unequal lines (excluding Henry’s own rejection of the claim). In response Governor Randolph argued that the Convention was right to begin the Constitution “We, the people” as the “government is for the people” and it would receive sanction from them. After all, “[i]f the government is to be binding on the people, are not the people the proper persons to examine its merits or defects?”¹⁸² Nonetheless, Randolph reiterated his earlier refusal to sign: “Wholly to adopt, or wholly to reject, as proposed by the convention, seemed too hard an alternative to the citizens of America, whose servants we were, and whose pretensions amply to discuss the means of their happiness were undeniable.”¹⁸³ Randolph’s articulation of his refusal to sign echoed that of his fellow Virginian George Mason’s in the Philadelphia Convention. Mason had objected that

¹⁸⁰ *Debates II*, 470. My emphasis.

¹⁸¹ *Debates II*, 470.

¹⁸² *Debates III*, 28-29.

¹⁸³ *Debates III*, 24. Randolph had attended the Philadelphia Convention but refused to sign the Constitution.

a second convention would be required after public debate, so it might be possible to “know more of the sense of the people, and to be able to provide a system more consonant to it. It was improper to say to the people, take this or nothing.”¹⁸⁴ Both Virginian hold-outs articulated an idea of the convention’s role as one of draftsman, conceiving a project under commission of the people, subject to modification by the people’s own hand or through the calling of a further convention.

The second response to Henry’s challenge came from the Federalists whose support for the Constitution was without (public) reservation. Repeating their commitment to the notion that “the people are... the fountain of all power,” these Federalists sought to follow Wilson’s lead in posing as clerks for the people.¹⁸⁵ In putting forth this position, Nicholas utilized textual allusions to argue that the use of “We, the people” was “highly proper: it is submitted to the people, because on them it is to operate: till adopted, *it is but a dead letter*, and not binding on any one; when adopted, it becomes binding on the people who adopt it.”¹⁸⁶ The “paper” over which they were debating was, to John Marshall’s thinking, not an assumption of power by the Philadelphia Convention.¹⁸⁷ In line with Wilson, Marshall saw the Philadelphia Convention as engaged only in “proposing” – and in this they sought no more authority than a private writer; “We are not bound to adopt it, if we disapprove of it. Had not every individual in this community a right to tender that scheme which he thought most conducive to the welfare of his country?”¹⁸⁸ However, the fullest articulation of this position came from Edmund Pendleton.

¹⁸⁴ Quoted in Maier, *Ratification*, 45.

¹⁸⁵ *Debates III*, 298.

¹⁸⁶ *Debates III*, 98. My emphasis.

¹⁸⁷ *Debates III*, 181.

¹⁸⁸ *Debates III*, 225.

Pendleton would seek to transform the Philadelphia Convention from authors to writers by suggesting the complete absence of authorial contribution: “Suppose the paper on your table [the Constitution] dropped from one of the planets; the people found it, and sent us here to consider whether it was proper for adoption; must we not obey them?”¹⁸⁹ Pendleton’s hypothetical radically reversed the actual narrative of the Constitution’s drafting, making irrelevant the Philadelphia Convention’s contribution. Here, the Constitution is without an author and it is the people who initiate its ratification process, sanctioning the state conventions to deliberate over the document on the people’s behalf. Pendleton poses here as the absolute servant of the people; the writer *in toto*.¹⁹⁰

North Carolinian debates echoed those of Virginia. In the ratifying convention, critics of the Philadelphia Convention led by Reverend Caldwell contested the authority assumed in “We, the people.” For Joseph Taylor

“the very wording of this Constitution seems to carry with it an assumed power. *We, the people*, is surely an assumed power... It seems to me that, when they [the framers] met in Convention, they assumed more power than was given to them. Did the people give them the power of using their name? This power was in the people. They did not give it up to the members of the Convention.”¹⁹¹

Again this challenge was met by a Federalist adoption of the posture of writers rather than authors.¹⁹² William Richardson Davie, a member of the Philadelphia Convention, sought to defend that meeting’s work. Stating that “no part was binding until the whole Constitution had

¹⁸⁹ *Debates III*, 38.

¹⁹⁰ *Debates III*, 293.

¹⁹¹ *Debates IV*, 23-24.

¹⁹² Nonetheless there was also a strand of thought that reflected Randolph’s and Mason’s positions. James Galloway would assess the Philadelphia Convention’s work thus: “The result of their deliberations is now upon the table also. As they have gone out of the line which the states pointed out to them, we, the people, are to take it up and consider it. The gentlemen who framed it have exceeded their powers, and very far... we have the power in our own hands to do with it as we think proper.” James Galloway at the North Carolina Convention. *Debates IV*, 25-26.

received the solemn assent of the people,” Davie emphasized the people’s authority.¹⁹³ He then moved to echo Wilson and Nicholas: “Is it not immediately through their recommendation that the plan of the convention is submitted to the people? *And this plan must remain a dead letter, or receive its operation from the fiat of this [ratifying] Convention.*”¹⁹⁴ The Constitution was, yet again, analogous to the work of a private writer; “The act of the Convention is but a mere proposal, similar to the production of a private pen.”¹⁹⁵

Others defended the use of “We, the people” on similar grounds, pointing out that the Philadelphia Convention sought to speak for the people only in anticipation of the people’s assenting to that articulation. James Iredell argued that, “...the style, *We, the people*, was not to be applied to the members themselves, but was to the style of the Constitution, when it should be ratified in their respective states.”¹⁹⁶ Here, ratification served as a *post hoc* commission of the writers’ work. The Constitution is the people’s direct voice prepared for them by the writers at Philadelphia. Archibald MacLaine, like Pendleton, would take this argument to its extreme and posit the very absence of an author at all. To quote MacLaine at length:

“The Constitution is only a mere proposal... After they [Philadelphia Convention] had finished the plan, they proposed that it should be recommended to the people by the several state legislatures. If the people approve of it, it becomes their act. Is not this merely a dispute about words [We, the people], without any meaning what ever? *Suppose any gentleman of this Convention had drawn up this government, and we thought it a good one; we might respect his intelligence and integrity, but it would not be binding on us.* We might adopt it if we thought it a proper system, and then it would be our act. *Suppose it had been made by our enemies, or had dropped from the clouds; we might adopt it if we found it proper for our adoption.*”¹⁹⁷

¹⁹³ *Debates IV*, 16.

¹⁹⁴ *Debates IV*, 16. My emphasis.

¹⁹⁵ *Debates IV*, 23.

¹⁹⁶ *Debates IV*, 23.

¹⁹⁷ *Debates IV*, 24-25. My emphasis.

MacLaine offers two ideas in this extract: The first, that only the people's assent can give substance to the Constitution's claims of authority; the second, that authorial prestige cannot be a basis for authority. Even acknowledging the possibility that "we might respect his [the author's] intelligence and integrity," this would be an insufficient basis for recommending a constitution. Indeed, even if it had come from one's enemy or fell from the sky, if it served the people's interest ("if we found it proper for our adoption") and received their assent, the Constitution would still be authoritative. In MacLaine's exposition in his state's convention, the only role the Philadelphia Convention could play was one of writership.

The Authority of the Convention

The commitment to the notion that the Philadelphia Convention had been mere "writers" of the constitutional text did not mean that every Federalist foreswore the persuasive authority of the particular members of the Philadelphia Convention. Even before the close of the Philadelphia Convention, Alexander Hamilton had privately conjectured that the "very great weight of influence of the persons who framed it, particularly in the universal popularity of General Washington" would be critical in securing the Constitution's ratification.¹⁹⁸ The Federalist press took a similar view, reminding readers whenever possible of the figures – particularly Washington and Franklin – involved in the document's production. The *Pennsylvania Gazette* reviewed the Constitution's signing in the Philadelphia Convention by noting Benjamin Franklin's endorsement, reasoning that the "concurrence of this venerable patriot in this

¹⁹⁸ Alexander Hamilton, "Conjectures About the Constitution," 1787, in *DHRC digital*. There is no evidence that this private note was circulated.

Government, and his strong recommendation of it, cannot fail of recommending it...”¹⁹⁹ Ten days later in New York, Curtius, writing in the *New York Daily Advertiser* would link Franklin and Washington to the document in urging its acceptance, suggesting it reflected “the highest honor upon its compilers; and adds a lustre, even to the names of Washington and Franklin!”²⁰⁰ In Massachusetts, a poem composed for the occasion, celebrated the role of Franklin and Washington while praising the Philadelphia Convention:

That these are the blessings, Columbia knows—
 The blessings the Fed’ral CONVENTION bestows.
 O! then let the People confirm what is done
 By FRANKLIN the sage, and by brave WASHINGTON.
Our freedom we’ve won, and the prize will maintain
By Jove we’ll Unite,
Approve and Unite—
*And huzza for Convention again and again.*²⁰¹

In December, the *Pennsylvania Herald* would opine that the presence of Franklin and Washington among the framers “leads to a suspicion of want of wisdom or want of virtue in the opponents of a system to which their sanction and hearty support is given.”²⁰² Such was the perceived importance of these figures that the Anti-federalist “Centinel” declared in his first number that Washington and Franklin must have been misled in signing.²⁰³

In truth, Centinel’s first essay – in which he told the people that “it behoves you well to consider, uninfluenced by the authority of names” the value of the proposed constitution – marked only the beginning of a growing Anti-federalist dissatisfaction with the Federalists’ use of the convention’s prestige.²⁰⁴ The “Federal Farmer” would gently suggest in early November

¹⁹⁹ *Pennsylvania Gazette*, September 19th, 1788, in *DHRC digital*.

²⁰⁰ “Curtius,” in *New York Daily Advertiser*, September 29th, 1787, in *DHRC digital*.

²⁰¹ “The Grand Constitution,” in *Massachusetts Centinel*, October 6th, 1787, in *DHRC digital*.

²⁰² *Pennsylvania Herald*, December 22nd, 1787, in *DHRC digital*.

²⁰³ “Centinel,” in *Philadelphia Independent Gazetteer*, October 5th, 1787, in *DHRC digital*.

²⁰⁴ “Centinal,” 1787.

that while Americans ought to “view the convention with proper respect...Perhaps the judicious friends and opposers of the new constitution will agree, that it is best to let it rest solely on its own merits, or be condemned for its own defects.”²⁰⁵ But by the end of November, “A Federal Republican” pleaded for the very idea that “[w]e may without derogating from the characters of the members of Convention, expect to find defects in the Constitution which they have framed.”²⁰⁶ In the course of ratification the tendency of the Federalists to deploy the convention’s membership to repress opposition became a point of exasperation for the Anti-federalists. “Helvidius Priscus” would challenge the notion that the Convention “were so much the peculiar favourites of heaven as to receive an immediate inspiration for the model of a government,”²⁰⁷ while “Centinel’s” growing anger saw him dub the framers in dripping sarcasm as the “immaculate convention.”²⁰⁸ William Findley would write that he was “Sorry that the Federalists addressed our implicit faith So much with great Names, instead of addressing our reason with Solid Arguments” [sic].²⁰⁹

The recurrence to the authority of convention and its members worked to undermine the posture of “writership” adopted by Federalists elsewhere. The claim that the Convention merely offered suggestions without any claimed authority was difficult to square with ongoing appeals to the stature of Washington, Franklin, and others. Arguments, such as Noah Webster’s that “we are almost impelled to suspect our own judgements, when we call in question any part of the system” given the convention’s composition of “some of the greatest men in America... *some* of them the *fathers* and *saviors* of their country,” did little to reassure Anti-federalists that the

²⁰⁵ “Federal Farmer,” “Letters to the Republican,” November 8th, 1787, in *DHRC digital*.

²⁰⁶ “A Federal Republican,” “A Review of the Constitution,” November 28th, 1787, in *DHRC digital*.

²⁰⁷ “Helvidius Priscus,” in *Independent Chronicle*, January 10th, 1788, in *DHRC digital*.

²⁰⁸ “Centinel,” in *Philadelphia Independent Gazetteer*, February 26th, 1788, in *DHRC digital*.

²⁰⁹ William Findley, “Excerpt from Letter to William Irvine, March 12,” 1788, in *DHRC digital*.

Federalists truly regarded the Convention as merely clerks of the people.²¹⁰ Some Anti-federalists saw in the continued appeals to the Convention the seeds of an aristocratic conspiracy, and expressed that view in print. Such attacks can be seen for example, in the “Federal Farmer’s” criticism of the disproportionate representation of the “aristocratic parts of the community” at the Philadelphia Convention²¹¹ and in “Cincinnatus” conjecture “that a monstrous aristocracy springing from [the Constitution], must necessarily swallow up the democratic rights of the union, and sacrifice the liberties of the people to the power and domination of a few.”²¹²

Such attacks sought to question the very prestige of the Convention that its Federalist advocates sought to mobilize. By November “A Plain Citizen” in Pennsylvania complained of “the virulence, and scurrility the worthy members of the late Convention have experienced.”²¹³ Towards the end of April 1788 George Lee Turberville looked back upon the ratification process and asked “[w]hat has not been done by ignorance – cunning – Interest – and Address to blast and blacken this Production? Misrepresentation – false reasoning - & wilful perversion have been made use of agt. the piece itself. Calumny and Falshood have Stamp’d the *objects of those* who framed it with the most infamous colours” [sic].²¹⁴ By late 1787 the promotion and criticism of the convention’s prestige had reached such a point that the Federalist Roger Sherman could wish to move beyond it and appeal instead to disinterested reason;

²¹⁰ Noah Webster, *An examination into the leading principles of the Federal Constitution proposed by the late Convention held at Philadelphia. With Answers to the principal objections that have been raised against the system. By a Citizen of America*, (Philadelphia: Prichard & Hall, 1787).

²¹¹ “Federal Farmer,” “Letters to the Republican”

²¹² “Cincinnatus,” “To James Wilson, Esquire,” in *New York Journal*, November 1st, 1787, in *DHRC digital*.

²¹³ “A Plain Citizen,” “To the Honorable Convention of the State of Pennsylvania,” in *Independent Gazetteer*, November 22nd, 1787, in *DHRC digital*.

²¹⁴ George Lee Turberville, “Letter to James Madison, April 16,” 1788, in *PJM digital*. Original emphasis.

“...one party has seriously-urged, that we should adopt the *New Constitution* because it has been approved by *Washington* and *Franklin*: and the other... have urged that we should reject, as dangerous, every clause thereof, because that *Washington* is more used to command as a soldier, than to reason as a politician – *Franklin* is *old* — others are *young* –and *Wilson* is *haughty*. You are too well informed to decide by the opinion of others, and too independent to need a caution against undue influence.”²¹⁵

Sherman’s attempt to focus upon the text rather than the Convention perhaps reflected concern that recurrence to the presence of great men at Philadelphia was opening the Federalists to the accusations of an aristocratic conspiracy but no longer yielding any persuasive advantage.²¹⁶

²¹⁵ “Countryman II,” in *New Haven Gazette*, November 22nd, 1787, in *DHRC digital*. Original emphasis.

²¹⁶ Sherman’s attempt to focus attention upon the text, absent any other textual authority points to the possibility of an engagement with the Constitution on the basis of something akin to the Protestant value of “*sola Scriptura*” (Scripture alone), absent the external authority of the framers or ratifiers. H. Jefferson Powell has argued that such an understanding of the Constitution was prevalent in 1787-88. Arguing that Americans in 1787-88 looked to the interpretative models provided by statutory law - that intention was expressed in the literal meaning of a document’s words, not the subjective intent of its’ author - Powell suggests that “[t]he Philadelphia framers’ primary expectation regarding constitutional interpretation was that the Constitution, like any other legal document, would be interpreted in accord with its express language” (H. Jefferson Powell, “The Original Understanding of Original Intent,” *Harvard Law Review* 98 (1985), 903). Similarly, Johnathan O’Neill has posited that in searching for constitutional “intent” during this period, “[a]lthough Americans occasionally consulted extrinsic sources, the usual practice, following Blackstone and the English inheritance, sought the originally intended meaning by examination of the constitutional text” (Johnathan O’Neill, *Originalism in American Law and Politics: A Constitutional History*, (Baltimore: Johns Hopkins University Press, 2005), 15). Offering the potential for understanding textual authority to reside in neither the people nor the framers, but rather in the text itself, this approach suggests the possibility of a third conception in which neither the framers nor the ratifiers hold an authoritative relationship vis-à-vis the text. This *sola Scriptura* approach might even permit the notion that the text can “evolve” in meaning over time, unbound to the framers’ intent or the ratifiers’ original understanding and thus open to re-interpretation on the basis of the changing contemporary understandings of the words, clauses, and claims that comprise the document. Such a position might accord with Frederick Douglass’s view in 1860 that the constitutional text did not support slavery no matter what may have been the intent of framers or ratifiers:

“This, I undertake to say, as the conclusion of the whole matter, that the constitutionality of slavery can be made out only by disregarding the plain and common-sense reading of the Constitution itself... by disregarding the written Constitution, and interpreting it in the light of a secret understanding.” (Frederick Douglass, “The Constitution of the United States: Is it Pro-slavery or Anti-slavery?” in *The Life and Writings of Frederick Douglass: Volume II Pre-Civil War Decade, 1850-1860*, ed. Philip S. Foner, (New York: International Publishers, 1950), 477).

As Douglass considered it, “[t]he American Constitution is a written instrument full and complete in itself. ...it should be borne in mind that the mere text, and only the text, and not any commentaries or creeds written by those who wished to give the text a meaning apart from its plain reading, was adopted

as the Constitution of the United States.” (Douglass, “The Constitution of the United States: Is it Pro-slavery or Anti-slavery?” 469).

The degree to which this was indeed a viable third alternative during and immediately following ratification can be overstated however. It would be unwise to conflate Sherman’s position in the midst of the ratification debates with a rejection of any subsequent popular textual authority. Prior to ratification, the people had not assumed textual authority, and so an argument based on the people’s textual authority was not available to Sherman. Post-ratification, Sherman articulated a view that the people – via the ratifying conventions – were indeed the authority behind the document. In discussions during the First Congress regarding amendment of the Constitution, Sherman indicated that the textual integrity of the document was linked to its popular ratification:

“The constitution is the act of the people, and ought to remain entire. But the amendments will be the act of the State Governments.” (Annals of Congress 1789, 735).

Rejecting the notion that amendments should be inserted into the original text, Sherman pointed to the mediated nature of the anticipated mode of amendment – proposed by the Congress and approved by the state legislatures – as a basis for regarding those acts as distinct from the originary textual authority of the people:

“The [Constitution] was established by the people at large, by conventions chosen by them for the express purpose. The preamble to the constitution declares the act: but will it be a truth in ratifying the next constitution, which is to be done perhaps by the State Legislatures, and not conventions chosen for the purpose?” (742)

Moreover, subsequent re-evaluation of Powell’s evidence has downplayed the degree to which attention to the text itself indicated a rejection of the textual authority of the ratifiers. Charles Lofgren’s re-evaluation of Powell’s sources has pointed to a commitment to the idea of ratifier intent within the Early Republic (Charles A. Lofgren, “The Original Understanding of Original Intent?” *Constitutional Commentary* 5 (1988); See also Jack N. Rakove, “The Original Intention of Original Understanding,” *Constitutional Commentary* 13 (1996), for Madison’s role in the development of ratifier intent). It is also the case that arguments conceiving of the text alone as authoritative often assumed the popular authorization of the document to be the basis of this authority. In line with Warner’s argument that the impersonal text was significant precisely because it interpellated the people – that the impersonal text underwrote “the popular authorship of the Constitution” (Warner, *Letters of the Republic*, 110) – early Americans articulated the textual authority of the Constitution as intimately linked to the idea of the people, as when Justice Chase opined in *Ware v. Hylton* that

“There can be no limitation on the power of the people of the United States. By their authority, the state constitutions were made, and by their authority the constitution of the United States was established; and they had the power to change or abolish the state constitutions, or make them yield to the general government, and to treaties made by their authority.” (U.S. 3 (Dall. 3) 199 1796).

While it is beyond the scope of this chapter to explore Douglass’ view of the constitution in detail, it is worth noting that even in his articulation of text alone, he noted the basis of this claim in the popular sanction of the document and the subsequent authority of the people over the form of the text. The Constitution “is a great national enactment done by the people, and can only be altered, amended, or added to by the people.” (Douglass, “The Constitution of the United States: Is it Pro-slavery or Anti-slavery?” 468).

Subsequently, some scholars have rejected the notion that a focus on the text alone can allow for evolution of meaning. Randy Barnett has suggested that “Powell underplays Madison’s and others’ commitment to an *originalist* meaning rather than to a public meaning that evolves over time” (Randy E. Barnett, “An Originalism for Nonoriginalists,” *Loyola Law Review* 45 (1999), 628. Original emphasis). Elaborating a theory of originalism in which the written text itself is authoritative, Barnett argues that “[w]e are bound because we *today* – right here, right now – profess our commitment to a written constitution, and original meaning interpretation inexorably from that commitment” (636. Original

Whatever his motivation, it is clear that by as early as November of 1787 Sherman anticipated that his audience was well versed in appeals to the framers' personal character. However, if Sherman had hoped to remove the Convention from the debate, the growing threat of amendments pushed other Federalists to embrace it as a necessary basis for textual authority.

Prior Amendment and Authorial Authority

James Madison's letters evinced a quiet confidence in the ratification of Constitution in the month after the adjournment of the Philadelphia Convention. In mid-October he noted that "[t]he Reports continue to be rather favorable to the Act of the Convention from every quarter."²¹⁷ Ten days later he advised William Short that although "[t]he Constitution has not been yet long enough before the public here to warrant any decided opinion concerning its fate. The general impression seems to be favorable as far as it is known."²¹⁸ At the end of the month he wrote Archibald Stuart that "[t]he first impression has been every where favorable except in Rh. Island. Nor is there any reason to suspect that the generality of States will not embrace the measure."²¹⁹ Others shared Madison's confidence.²²⁰

However, during that very month Richard Henry Lee reached out to likely opponents of the Constitution, offering his own proposed amendments to the text and asking "why may not such indispensable amendments be proposed by the Conventions and returned With the new plan

emphasis). In this sense, recognition of an objective text as authoritative does not automatically legitimize evolution in the meaning of that text. Moreover, as Barnett suggests, even this static text is bound to popular sanction for its authority ("...we *today*... profess our commitment...").

²¹⁷ James Madison, "Letter to George Washington, October 14," 1787, in *PJM digital*.

²¹⁸ James Madison, "Letter to William Short, October 24," 1787, in *PJM digital*.

²¹⁹ James Madison, "Letter to Archibald Stuart, October 30," 1787, in *PJM digital*.

²²⁰ Edward Carrington, "Letter to William Short, October 25," 1787, in *DHRC digital*; Nicholas Gilman, "Letter to President John Sullivan, October 31," 1787, in *DHRC digital*; Christopher Gadsden, "Letter to Thomas Jefferson, October 29," 1787, in *DHRC digital*; Walter Minto, "Letter to the Earl of Buchan, October 28," 1787, in *DHRC digital*.

to Congress that a new general Convention may so weave them into the proffer'd system as that a Web may be produced fit for freemen to wear?"²²¹ Lee's suggestions and his letter to Edmund Randolph were reprinted in mid-November in the Winchester *Virginia Gazette*, and then to greater response in the Petersburg *Virginia Gazette*.²²² In the same month other writers began to echo Lee's question. "A Federal Republican" suggested that while it was true that the "wisdom of those patriots who composed the late Convention" might be relied upon to a great degree, "surely the people for whom they have acted have an undoubted right to offer such objections as they may suppose to exist."²²³ Articulating a similar position, the "Federal Farmer" suggested that

"because forty or fifty men have agreed in a system, to suppose the good sense of this country, an enlightened nation, must adopt it without examination, and though in a state of profound peace, without endeavouring to amend those parts they perceive are defective, dangerous to freedom, and destructive of the valuable principles of republican government—is truly humiliating."²²⁴

Elsewhere "An Old Whig" asked "if the people in the different states have a right to be consulted, in the new form of continental government, what authority could the late convention have to preclude them from proposing amendments to the plan they should offer?"²²⁵ If the people were to be the authority behind the new Constitution, what grounds could there be for stopping the people from altering the document as they desired? And these were not idle speculations - on the 25th October the Virginia Assembly opted to allow "full and free

²²¹ Richard Henry Lee, "Letter to Samuel Adams, October 5," 1787, in *DHRC digital*. Cf also. Richard Henry Lee, "Letter to George Mason, October 1," 1787, in *DHRC digital*; Richard Henry Lee, "Letter to William Shippen Jr., October 2," 1787, in *DHRC digital*; Richard Henry Lee, "Letter to Elbridge Gerry, September 29," 1787, in *DHRC digital*; Richard Henry Lee, "Letter to Edmund Randolph, October 16," 1787, in *DHRC digital*.

²²² John P. Kaminski et al., Editorial Comment to Letter from Richard Henry Lee to Edmund Randolph, December 6, 1787, in *DHRC digital*.

²²³ "A Federal Republican," "A Review of the Constitution"

²²⁴ "Federal Farmer," "Letters to the Republican"

²²⁵ "An Old Whig," in *Philadelphia Independent Gazetteer*, November 28th, 1787, in *DHRC digital*.

investigation and discussion” of the Constitution in its state convention – a concession to the members of the Virginia General Assembly who sought prior amendment.²²⁶

In the minds of the Federalists, popular amendment of the Constitution prior to ratification, either by state conventions or a second constitutional convention, would be an effective defeat for the Constitution. Only eleven days after the Constitution was signed, Daniel Clymer suggested in the Pennsylvania Assembly that individual state amendments would destroy what unity existed amongst the states. Challenging the Assembly to capitalize upon the unity of the Philadelphia Convention, he asked

“can it be supposed the United States would submit to the amendments and alterations to be made by a few inhabitants of Pennsylvania? Could it be expected that... Virginia and the Southern States shall coincide with alterations made only for the benefit of Pennsylvania? No! Away with such idea, and let that unanimity prevail at its adoption that it did at its formation.”²²⁷

Were each state to offer amendments, there was little hope that these suggestions would be accepted by the others. In place of a national debate over the adoption or rejection of the constitutional text there would emerge a competition of (up to) thirteen distinct proposals, with no incentive for any state to forego its immediate interests. James Madison expressed his concern in a letter to Archibald Stuart in December of 1787 that the project of prior amendment was “pregnant with consequences which [the advocates] fail to bring into view.” It was “impossible indeed to trace the progress and tendency of this fond experiment without perceiving the difficulty and danger in every Stage of it.”²²⁸ Furthermore Madison posited, amendments could be used by the Constitution’s opponents in order to derail the proposed Constitution. Identifying Patrick Henry as one such figure, Madison suggested to Jefferson that while Henry “concurs at

²²⁶ “House Resolutions,” October 25th, 1787, in *DHRC digital*.

²²⁷ Daniel Clymer, “Speech at Pennsylvania Assembly, 28 September,” 1787, in *DHRC digital*.

²²⁸ James Madison, “Letter to Archibald Stuart, December 14,” 1787, in *PJM digital*.

present with the patrons of Amendments, [he] will probably contend for such as strike at the essence of the System.”²²⁹

Even an additional convention offered little prospect of agreement once the possibility of amendment gained purchase:

“Should an attempt now be made to alter [the Constitution], it must be by a new convention, and the non-concurring States, would naturally send Members to the new convention who were warm for making the wished for alterations; and is it probable the other States would agree to such alterations? Is it not much more probable, they would disagree? ... Amidst the various and opposite propositions, can we suppose an union would take place?”²³⁰

Reflecting upon what was known of the Constitution’s opponents, “Philanthropos” reasoned that

“[w]hen we observe how much the several gentlemen of the late Convention, who declined to sign the federal constitution, *differ in their ground of opposition*, we must seen how improbable it is, that another convention would unite in the same degree to any plan.”²³¹

Washington wrote to LaFayette in early 1788 of his wonder “that sensible men should not see the impracticability of the scheme. The members would go fortified with such Instructions that nothing but discordant ideas could prevail.”²³²

Without each state ratifying the Constitution as proposed, the Federalists saw no prospects for a successful replacement of the Articles of Confederation. Successful attempts at amendment prior to ratification would mark the effective defeat of their hopes for a centralized government. Moreover, Madison noted in his letter to Jefferson, Virginia’s lead had been

²²⁹ James Madison, “Letter to Thomas Jefferson, December 9,” 1787, in *PJM digital*.

²³⁰ “An American,” in *Independent Chronicle*, November 30,” 1787, in *DHRC digital*.

²³¹ “Philanthropos,” in *Pennsylvania Gazette*, January 16th, 1788, in *DHRC digital*.

²³² George Washington, “Letter to the Marquis de Lafayette (excerpt), February 7,” 1788, in *DHRC digital*.

followed by Maryland. Going into 1788, it appeared that amendments posed a significant threat to the Constitution, a fear reinforced as the convention in Massachusetts looked to recommendatory amendments to ensure ratification.²³³ Caught between a strategic need to resist amendment and an ideological and procedural commitment to popular authority, some Federalists saw the need for a textual authority prior to ratification. The Philadelphia Convention's limited mandate of providing suggested revisions to the Articles of Confederation had provided Federalist with no legal basis from which to argue that ratification could only be adoption or rejection of the Constitution as written. Seeing the importance of unity for the document in the process of ratifying it, they sought an authority that could provide that unity in the absence of legal sanction for their actions. Without legal authority (which could only have come from a direct commission for a new constitution by the people or their representatives), they turned to the authority that the Convention held vis-à-vis the constitutional text. In these instances, Federalists offered arguments reliant upon the nature and composition of the Philadelphia Convention in order to deny the legitimacy of textual amendment.

Authorship and the Constitution

From early 1788 then, a unifying authority for the constitutional text became a requirement for those Federalists who sought to deny the legitimacy – and not mere inconvenience - of prior amendment. Turning now to three such efforts, the article traces the responses of Alexander Contee Hanson, John Jay, and James Madison to this issue, showing the manner in which each writer invoked the authority of the Convention in order to protect the

²³³ Rufus King, "Letter to James Madison, January 23," 1788, in *PJM digital*.

constitutional document from dismemberment. Taken together, they illustrate the awareness of some Federalists of the need for a textual authority in the liminal period between the Constitution's production and its authorization by the people. Between them they advanced two interrelated claims. The first was the procedural claim that any future assembly or convention would be unable to engage in the compromise and negotiation afforded by the conditions experienced by the Philadelphia Convention. The second was the impossibility of forming a second convention equal in talent to the body gathered at Philadelphia. In responding to arguments for prior amendment, these Federalist writers did not reject the amendments on the basis of substance or the difficulty of ensuring agreement over them alone. Instead they invoked the Convention as authority whose work was deserving of unique respect. The convention's product was the result of the impossible to recreate convention and, as such, attempts at amendment were not merely inconvenient but illegitimate. That is to say, that they invoked the particular authority that an author has over their text in order to argue that the document should not be subjected to revision prior to its popular approval.

In early 1788, Alexander Contee Hanson, writing under the pseudonym "Aristides," issued a pamphlet entitled "Remarks on the Proposed Plan."²³⁴ In the essay, Hanson, a Maryland General Court judge, set out to counter what he regarded as the key objections to the Constitution that had emerged from its opponents. Before turning his attention to these objections, he noted that both sides had "laid a particular stress on the names" attached to the document. Reviewing the composition of the Convention he feigned shock at the "vague insinuations" directed towards them, and at the same time gently praised the "illustrious assemblage" at Philadelphia. Significantly though, he resisted an argument for the perfection of

²³⁴ "Aristides," "Remarks on the Proposed Plan," January 31st, 1788, in *DHRC digital*.

the document. He affirmed the limited scope of the convention's powers, stating that they had not exceeded their role of offering suggestions for amendment; "Its office was to advise, and no further has it proceeded." And allowing for at least the possibility of imperfection, Hanson made a case for reform of the Constitution – if required – after its acceptance:

"If there be any man, who approves the great outlines of the plan, and... would reject it, because he views some of the minute parts as imperfect, he should reflect, that, if the states shall think as he does, an alteration may be hereafter effected, at leisure."

Hanson's position was thus far a nuanced one – he praised the personal capacities of the Philadelphia Convention, but suggested that theirs was a limited role of proposing and that people had the power to amend the convention's product. Thus far Hanson seemed in agreement with the idea of the Convention as writers.

However, Hanson made a point of opposing amendment of the text prior to its ratification. Noting the impracticalities of multiple revisions of the document – that if every state were given the chance to amend the text the result would likely be thirteen proposals in the place of one – he suggests that in following that path

"there can never be an end. We must return to this, - that whatever is agreed on, by the assembly appointed to propose, must be either adopted in the whole, or in the whole rejected."

Even were there to be a second convention, equipped with the recommendations of the states, they would be unable to decide which reforms and objections were pre-eminent. The result of such an experiment would be a similar return to the thirteen states and the "same probability of a mutilated plan." Complete adoption or complete rejection were the only options Hanson could foresee for the plan. But how could the impossibility of amendment prior to acceptance or rejection be squared with a commitment to the idea that the people were to be the ultimate authority for the Constitution? If the people were only "advised" by the Philadelphia Convention,

then surely the former could decide which advice to take and which to reject – approving what they approved of, and cutting out what they did not?

Hanson may have been correct in identifying the inconveniences in subjecting the document to multiple revisions, but this alone did not provide a principled reason for accepting the document as prepared by the members of the convention. Hanson here fell back on the particular character of the members in order to make a principle of a practicality. The ratifying conventions ought not insert their own revisions because the Constitution represented the work of the nation's "first characters." And a second convention, "if it consist of different men, must *inevitably* be inferior to the first" and was unlikely to provide a proposal superior to the current. Trust ought to be placed in "the wisdom of America" and the plan proposed by it. Here then, was Hanson's defense of the Constitution in the face of prior amendment – that as the "product of [the] joint wisdom" of America's "august assembly" the unity of the proposal must be accepted as presented, at least until ratification transferred responsibility for the document to the people. The people would grant it authority, but until then the authorial intent of the Convention bound the Constitution together and made amendment an illegitimate act.

In *Federalist* 85 Hamilton took up the prospect of prior amendments briefly, in order to express his belief that amendments would be more easily obtained after ratification than before, and to direct the attentions of his readers to "an excellent little pamphlet lately published in this city," the contents of which "are unanswerable to shew the utter improbability of assembling a new convention" for the purpose of prior amendment.²³⁵ The pamphlet, John Jay's pseudonymous "An Address to the People of the State of New York," signed "A Citizen of New-

²³⁵ Alexander Hamilton, "The Federalist No. 85," in *The Papers of Alexander Hamilton Digital Edition*, ed. Harold C. Syrett.

York,” provided a detailed argument against the idea of a second convention amending the work of first.

Jay’s pamphlet offered an account of the Philadelphia Convention in which the members comprised such talent and proven patriotism that criticism of them reflected badly on the people, not the convention;

“Let us continue careful therefore that facts do not warrant historians to tell future generations, that envy, malice and uncharitableness pursued our patriotic benefactors to their graves.”²³⁶

The convention’s “temper and talent” enabled it to “reconcile the different views and interests” of the states and produce unanimity on “a subject so intricate and perplexed.” Indeed, such was the task that its very accomplishment was evidence that “it must have been thoroughly discussed and understood.” Deploying the argument that the very existence of a single proposal proved it to be the only possible one, Jay cautioned that

“Gentlemen out of doors therefore should not be hasty in condemning a system, which probably rests on more good reasons than they are aware of, especially when formed under such advantages, and recommended by so many men of distinguished worth and abilities.”

But if Jay’s argument echoed the elitism of Hanson’s (one critic derided Jay’s use of an “hackneyed argument... drawn from the character and ability of the framers of the new constitution”²³⁷), he also went further in making a procedural argument for the convention’s unique ability to provide a constitution.

Jay had deployed the talent of the Convention in order to deny the possibility that “[g]entlemen out of doors” might legitimately offer amendments to the constitution that they

²³⁶ “A Citizen of New-York,” “An Address to the People of the State of New York,” April 15th, 1788, in *DHRC digital*.

²³⁷ “A Plebian,” “An Address to the People of New York,” April 17th, 1788, in *DHRC digital*.

were asked to ratify. The concessions and negotiations that had taken place in Philadelphia had produced a document that was acceptable to each state, although not the ideal of any particular one. Emphasizing the mutual accommodation and respect which he attributed to the convention, Jay suggested that amendment would undo the delicate settlement achieved. If the people of the states sought amendments, it was because they were not in a position to comprehend the necessary balances struck by the convention. As the product of that particularly auspicious body, the text should be maintained as it had been delivered.

Moreover, he went further in arguing that the ratification debates had themselves made additional conventions necessarily deficient. Addressing the potential argument that a subsequent convention would better know the sense of the people and perhaps even equal the Philadelphia Convention in terms of talent, Jay argued that circumstances made this impossible. The divisive nature of the ratification process had created partisans whose votes would make the “spirit of candor, of calm enquiry” which had marked the first unattainable:

“Federal electors will vote for federal deputies, and anti-federal electors for anti-federal ones. Nor will either party prefer the most moderate of their adherents... so the men most willing and able to carry points, to oppose, and divide, and embarrass their opponents will be chosen.”²³⁸

The Philadelphia Convention was therefore a unique body, a mixture of talents and circumstance whose very work rendered it irreproducible. And as such that assembly’s product could not be revised by subsequent conventions. As with Hanson, Jay argued for an unique authority on the part of the Philadelphia Convention that denied the legitimacy of amendment until after authorization by the people.

²³⁸ “A Citizen of New-York,” “An Address to the People of the State of New York”

In *Federalist 41*, Madison would map out a similar approach to the threat of amendment as that offered by Hanson. In *Federalist 40* Madison followed the Federalist approach of framing the Philadelphia Convention as a body of drafters and emphasizing people's authority, but with slight nuance:

“[i]t is time now to recollect that the powers [of the convention] were merely advisory and recommendatory; that they were meant so by the States and so understood by the convention; and that the latter have accordingly planned and proposed a Constitution which is to be of no more consequence than *the paper upon which it is written*, unless it be stamped with the approbation of those to whom it is addressed.”²³⁹

Madison repeated the claim that the Convention operated only in the capacity of proposing body. But he also stressed the convention's commission by the states – that the Philadelphia Convention was tasked with producing proposals for review, which will receive approbation from the people. Breaking down the constituting procedural into two steps, Madison arrived at a position that included a role for the framers as authors.

Following the discussion of the convention's task in *Federalist 40* but immediately bearing upon a dispute over taxation powers, Madison wrote in *Federalist 41*; “But the idea of an enumeration of particulars which neither explain nor qualify the general meaning, and can have no other effect than to confound and mislead, is an absurdity, which, as we are reduced to the dilemma of charging either on the authors of the objection or *on the authors of the Constitution*, we take the liberty of supposing had not its origin with the latter.”²⁴⁰ This use of “authors of the Constitution” is the only time that construction is used in *The Federalist Papers*. Building from the positions of the other Federalists, one would expect that Madison would be keen to assert the limited nature of the Philadelphia Convention's claim to the text. As has been seen elsewhere, some Federalists worked to dismiss or at least obscure the authorial claims of the convention.

²³⁹ James Madison, “The Federalist No. 40,” in *PJM digital*. My emphasis.

²⁴⁰ James Madison, “The Federalist No. 41,” in *PJM digital*.

However, in utilizing “authors” here, Madison seems to have the framers as authors very much in mind.²⁴¹

The context of the particular discussion, one of intent behind the language of the Constitution, also points towards an understanding of the “authors” as being the Philadelphia Convention. Anti-federalist critics derided the partial enumeration of congressional powers as an all-too-flexible mechanism for constraining the legislature. Without the full enumeration, there was little to stop the legislature from exceeding the powers supposed to be granted it.²⁴² Madison took the position that the enumeration is sufficient and that in this case exceeded the claims made in the objection, arguing that the objection is based on willful misreading of Article 1, Section 8 of the Constitution. Madison met these objections on the field of language, and dove into the grammatical arrangement of the actual sentence;

²⁴¹ Madison’s long involvement in questions of copyright make it likely that in using “author” he sought to denote a degree of ownership. A member of the committee on the subject of literary property in the Continental Congress, Madison, alongside Hugh Williamson and James Izard had recommended the creation of state copyright laws in 1783. Additionally, he had proposed a copyright measure to the Philadelphia Convention and was a member of the Committee of Eleven who composed the final draft of the copyright clause (*Journals of the Continental Congress, 1774-1789*, ed. Worthington C. Ford et al. (Washington DC, 1904-37): 326-327. On Madison’s involvement see Noah Webster, “Origin of Copyright Laws of the United States” in Noah Webster, *A Collection of Papers on Political, Literary and Moral Subjects*, (New York: Burt Franklin, 1968): 174. See also Tyler T. Ochoa and Mark Rose, “The Anti-monopoly Origins of the Patent and Copyright Clause”, *Journal of the Copyright Society of the U.S.A.* 49 (2002): 688-689). Despite a probable reliance on Blackstone’s erroneous *Commentaries on the Laws of England*, Madison also seemed to have paid attention to copyright discussions abroad. Madison would state in *Federalist 43* that the “copyright of authors has been solemnly adjudged in Great Britain to be a right of common law.” In fact, the decision in *Donaldson v. Beckett* (1774) had found that an author held copyright in common law only until the moment of publication. However Blackstone’s *Commentaries* had predated the decision and given the impression that copyright would be ultimately grounded in common law (James Madison, “The Federalist No. 43,” in *PJM digital*; William Blackstone, *Commentaries on the Laws of England*, (Oxford: Clarendon Press, 1765-1769), 405-407. On the case see William F. Patry, *Copyright Law and Practice: Volume I*, (The Bureau of National Affairs, Inc.: Washington DC, 1994), 12; Lyman Ray Patterson, *Copyright in Historical Perspective*, (Nashville: Vanderbilt University Press, 1968), 15-16; Mark Rose, “The Author as Proprietor: Donaldson v. Becket and the Genealogy of Modern Authorship,” *Representations* 23 (1988)).

²⁴² A parallel concern about enumeration led to Anti-federalist calls for a Bill of Rights (Howe 2004, 208).

“But what color can the objection have, when a specification of the objects alluded to by these general terms immediately follows and is not even separated by a longer pause than a semicolon? If the different parts of the same instrument ought to be so expounded as to give meaning to every part which will bear it, shall one part of the same sentence be excluded altogether from a share of the meaning; and shall the more doubtful and indefinite terms be retained in their full extent, and the clear and precise expressions be denied any signification whatsoever?”²⁴³

Madison claimed that the disputed section of the first article of the Constitution should be understood in accordance with established modes of composition – and that to read it otherwise is a perversion that ought not be attributed to the “authors of the Constitution.” In drawing upon linguistic usage as the basis of his response, Madison mobilized the authorial authority of the framers, and in so doing forewent the position that the framers are without any authority vis-à-vis the Constitution.

While such clashes over language were characteristic of the ratification debates, Madison might have responded without conceding the fiction of the framers as writers. As Howe has documented, Anti-federalists were highly concerned by the Federalist attitude towards the flexibility of language.²⁴⁴ Federalists, viewing the events of the 1780s, had come to conclude that the rhetoric and concepts advanced during the imperial crisis were no longer wholly appropriate to the former colonies. Without desiring to diminish the republican nature of post-colonial politics, they came to regard virtue as a weak protection against loss of liberty. Instead, as evinced in the Constitution, they sought to balance interest against interest in order to avoid the emergence of a dominant, and so liberty-threatening, grouping.²⁴⁵ However, the nature of Madison’s argument here avoids recourse to claims that the interlocking of departments will

²⁴³ James Madison, “The Federalist No. 41”

²⁴⁴ John Howe, *Language and Political Meaning in Revolutionary America*, (Amherst: University of Massachusetts Press, 2004), 202-203.

²⁴⁵ Howe, *Language and Political Meaning in Revolutionary America*, 218-221.

ensure that congressional powers are not abused. Neither does he posit that the character of politicians will preclude abuse. As Howe's analysis suggests, these would have been the standard retorts from a typical Federalist.

As with Hanson, Madison believed that once conceded, the idea of amendments would fracture the unity of both the opponents and advocates of the Constitution in the various states – for it was unlikely that each state would seek the same reforms or be minded to honor those of differing states. Responding to Edmund Randolph a week before *Federalist 41* was printed at the beginning of 1788,²⁴⁶ Madison would chide the Governor for his folly in thinking a second convention would ease the Constitution's passage; "the inference with me is unavoidable that were a second trial to be made, the friends of a good constitution for the Union would not only find themselves not a little differing from each other as to the proper amendments; but perplexed & frustrated by men who had objects totally different."²⁴⁷

Madison went further in this letter than merely despairing the damage amendments might render to the Constitution, he also made the case for authorial authority as a principle at this juncture. The letter expresses Madison's view that in the midst of ratification, prior to the assent of the people, the Federalists must make use of authorial authority to defend the Constitution. A second convention recognizing the people's ability to propose amendments would risk what little purchase the Constitution held in early 1788:

"The great body of those who are both for & against it [the Constitution], must follow the judgment of others not their own. Had the Constitution been framed &

²⁴⁶ The first printings of *Federalists 37-41* were published in mid-January 1788. Given the delays in mail of the time it is probable that letters from December 1787 through to the first week of January 1788 reflect Madison's information and concerns at the time of composition of these numbers. On the frantic nature of composition and publication of the essays (cf. Douglass Adair, "The Authorship of the Disputed Federalist Papers," *William & Mary Quarterly* 1 (1944): 241).

²⁴⁷ James Madison, "Letter to Edmund Randolph, January 10" 1787, in *PJM digital*.

recommended by an obscure individual, *instead of a body possessing public respect & confidence*, there can be no doubt, that altho' *it would have stood in the most identical words*, it would have commanded little attention from most of those that now admire its wisdom.²⁴⁸,

In this argument, Madison is abandoning the Federalist position staked out elsewhere by Pendleton and MacLaine. Where they argued that the identity of the writers was irrelevant, Madison locates the very authority that the Constitution commands *in* the persons of the authors. The reversal here – that the public reputation of the authors is the basis of the text's claim to public support, not the words themselves – fits with Madison's concerns regarding ratification. Placed within the context of opposing prior amendment of the document, Madison can be seen here to collapse the unity of the text and the stature of the framers into one – the threat to the document posed by a second convention is important because it undercuts the authority that the “body possessing public respect & confidence” could command.

Madison conceived of Randolph's hoped-for second convention as a grave threat because it would create conflicting amendments, but also because it would undermine public confidence in the Philadelphia Convention itself. Madison was not primarily concerned that a “re-edited” constitution would lack endorsement, but rather than the existence of a second convention in addition to the first would “destroy an effectual confidence” in either convention. A second convention would strike at the only basis of authority, albeit extralegal, at this point within the ratifying process, the authority the Convention commanded as a consequence of the confidence placed in it – an authority transferred to the document by the convention's act of authorship. The loss of authority by the Convention would be critical, because it was the Convention's authority that provided the document's – without a “general confidence of the people” in those who offered the document for consideration, there was no basis for the document's authority.

²⁴⁸ James Madison, “Letter to Edmund Randolph, January 10.” My emphasis.

In this sense, the deployment of “authors of the Constitution” in *Federalist 41* can be understood as an echo of the ratification debate surrounding it. In calling on the Constitution’s textual authors, Madison is invoking the only available unifying authority for the text *prior to* its popular approval. In the all-or-nothing battle for the Constitution, the authority of the Philadelphia Convention is necessary both strategically and textually to solidify the unity of and for the constitutional document.²⁴⁹ Meeting the “authors of the objection” on the field of language is not a momentary slip of Federalist identification as writers, but a step to bolster the Constitution by an appeal to a unifying authority. The threat to the constitutional text is a corresponding threat to its passage, and Madison meets the dual threat through mobilization of the “Author Function.”²⁵⁰

Interpreted in this way, Madison’s “Publius,” Jay’s “A Citizen of New-York,” and Hanson’s “Aristides” were not rejecting the commitment to popular sovereignty evidenced in their fellow Federalists’ posture as writers. Rather, their actions might be best comprehended as a studied observance of the consequences for notions of authority within a two-step ratification process. As Madison had noted himself, “a Constitution... is to be of no more consequence than the paper upon which it is written” until the people give it sanction.²⁵¹ But in the midst of the ratification process the people could not provide the unifying authority required to see the Constitution through. And neither, without time to garner its earned reverence could the text of the Constitution itself. Prior to authorization by the people, Madison, Jay, and Hanson were

²⁴⁹ Reflecting perhaps the persuasive limits of an invocation of the other absolute that Madison had mobilized on behalf the Constitution – the Almighty; “It is impossible for the man of pious reflection not to perceive in it [the success of the Philadelphia Convention in fulfilling its task] a finger of the Almighty hand which has been so frequently and signally extended to our relief in the critical stages of the revolution” (James Madison, “The Federalist No. 37,” in *PJM digital*). Although it is worth noting that this invocation of divine authority is refracted through the Convention as drafters.

²⁵⁰ Michel Foucault, “What is an Author?” in Michel Foucault, *The Foucault Reader*, ed. Paul Rabinow, (New York: Pantheon Books, 1984).

²⁵¹ James Madison, “The Federalist No. 40”

required to invoke the convention's authority vis-à-vis the text – the author's authority – in order to ensure the text's integrity in the face of amendment. But they did so only for the liminal period of the ratification debate, acknowledging the people's authority over the text upon ratification.

Post-Ratification

Post-ratification, Madison strove to emphasize the view that it was the people, via the ratification conventions, that provided authority to the Constitution. In 1796 he would reiterate the view that the Constitution was “nothing but a dead letter, until life and validity were breathed into it, by the voice of the people” and repeated this view for the remainder of his life.²⁵² Taking to the floor of the House of Representatives in 1789, he proposed the amendments that formed the basis of the Bill of Rights. The first of Madison's proposed amendments was an assertion of the people's sovereign authority in relation to the Constitution;

“First. That there be prefixed to the Constitution a declaration, that all power is originally invested in, and consequently derived from the people.

That Government is instituted and ought to be exercised for the benefit of the people...

That the people have an indubitable, unalienable, and indefeasible right to reform or change their Government, whenever it be found adverse or inadequate to the purposes of its institution.”²⁵³

²⁵² Quoted in Maier, *Ratification*, xvii. Levy asserts that after a sole exception in 1791, Madison would never claim any interpretative authority but the ratification conventions. (Leonard Levy, *Original Intent and the Framers' Constitution*, (Chicago: Ivan R. Dee, 2000), 7-8.

²⁵³ James Madison, “Amendments to the Constitution,” (1789) in *PJM digital*. My emphasis. Madison's language here chimes with (although perhaps exceeds) the Lockean notions of popular sovereignty found in the *Second Treatise* (John Locke, “The Second Treatise: An Essay Concerning the True Original,

As this commitment suggests, upon ratification of the Constitution the authority was understood to transfer from the framers to the people. While Madison would not endorse unrestrained intervention in the constituted order, he nevertheless was willing to recognize the people as entitled to reform the government at their will.²⁵⁴ The proposed, but never ratified,²⁵⁵ amendment acknowledges the idea, in line with Hanson's, Jay's, and Madison's use of authorial authority, of a constitutional document, whose unity and authority was initially a product of a discrete group of framers, subsequently endorsed by the people. Although authorized by the people, it does not originate from them.

The two-step model of constitutional creation used in 1787-88, with a text produced by convention and subsequently ratified by the people, and the deployment of authorship within this framework provides an explanation for the emergence in the Nineteenth century of the role of the framers as interpretive guides. Although invoked only until ratification, the authority of the Convention did not dissipate upon adoption of the Constitution. The Fourth of July orations of 1788 reflected an understanding of the constitution-making process that celebrated the uniqueness of the Philadelphia Convention, and reduced the people's role to acceptance of their wisdom. In New Haven, Simeon Baldwin claimed that

“[n]ever before has the collected wisdom of any nation been permitted quietly to deliberate, and determine upon the form of government best adapted to the genius, views and circumstances of the citizens. Never before have the people of any

Extent, and End of Civil Government,” in *John Locke, Two Treatises of Government and A Letter Concerning Toleration*, ed. Ian Shapiro, (New Haven: Yale University Press, 2003).

²⁵⁴ Too ready revision of the Constitution would risk the veneration required to establish its governing authority. Critical of Jefferson's support for generational sovereignty, Madison wrote to his friend in 1790, “[w]ould not a Government so often revised become too mutable and novel to retain that share of prejudice in its favor which is a salutary aid to the most rational Government?” (James Madison, “Letter to Thomas Jefferson, February 4,” 1790, in *PJM digital*).

²⁵⁵ Despite the lack of ratification, the existence of Article V of the US Constitution is itself an acknowledgement of this very principle.

nation been permitted, candidly to examine, and then *deliberately adopt or reject* the constitution proposed.”²⁵⁶

Similarly, Savannah heard an oration in which the people were recipients of the convention’s Constitution; “This is handed to the people, - its contents are examined, and, after the utmost freedom of discussion, they come forward, and peaceably join in a new compact.”²⁵⁷ In Providence, Enos Hitchcock suggested that the honor of the people lay in their willingness to accept the convention’s work:

“The abilities and political knowledge, - the patient deliberation and constant attention, - the mutual candour and condescension, which were exhibited by those who framed the Federal Constitution – and the similar spirit which actuated the most of those States in which it has been received, do immortal honour to our country...”²⁵⁸

The possibility of prior amendment is absent from these narratives, along with the ceding of authority over the text to the people upon ratification. Tellingly, the humility of the Convention as mere writers makes no appearance, and people’s role is conceived as one of acceptance or rejection – to the point that in Boston the restriction of their role to one of binary choice is marshaled as further evidence of convention’s wisdom.²⁵⁹

The Author-function and the Constitution

The assumption that the author is the first owner of a text is of importance to our examination of the Constitution insofar as the authorial relationship came to be understood as a tool in classification and interpretation. Already in the late Eighteenth century the “fixedness” of linguistic meaning was being challenged, calling forth a need to navigate texts with the help of externally supported modes of interpretation. The weakening faith in text alone reached to the

²⁵⁶ Simeon Baldwin, “Oration, New Haven, July 4,” 1788, in *DHRC digital*. My emphasis.

²⁵⁷ William Pierce, “Oration, Savannah, July 4,” 1788, in *DHRC digital*.

²⁵⁸ Enos Hitchcock, “Oration, Providence, July 4,” 1788, in *DHRC digital*.

²⁵⁹ Harrison Gray Otis, “Oration, Boston, July 4,” 1788, in *DHRC digital*.

Constitution itself, challenging key assumptions associated with it and heightening the significance of the dual conceptions of authorship offered by Madison.

As noted, Warner has argued that the Constitution's power at the time of its ratification lay in its ability to tap into the understanding of texts that underpinned the republican printed sphere. The conception of print as disinterested contribution to public debate, drawing authority from no particular individual, provided a basis for regarding the constitutional text as non-reliant on hierarchical forms of authority. Without a reliance on external authority, the constitutional text could constitute the authority from which it derived its power. The people could partake in the creation of their own constituted government without recourse to a pre-existing and legitimizing authority. Echoing Derrida's account of the signing of the Declaration of Independence,²⁶⁰ Warner describes the process in the following way:

“By constituting the government, the people's text literally constitutes the people. In the concrete form of these texts, the people decides the conditions of its own embodiment. The text itself becomes not only the supreme law, but the only original embodiment of the people.”²⁶¹

Underwriting the popular authorship of the Constitution, the text was seen as emanating from no one, deriving its authority from the very process by which it interpellated the people. “The Constitution's printedness allows it to emanate from no one in particular, and thus from the people.”²⁶² But positing the document as deriving from no one in particular requires the corresponding idea that its language holds “plain meaning”, universally comprehensible, if it is to operate as a shared basis of government. Just as the polemic interventions of the imperial crisis relied only on reason and persuasive power for their authority, so too must a non-authored Constitution appeal only internally for meaning. If it was to emanate from all, it also had to be comprehended by all.

²⁶⁰ Jacques Derrida, “Declarations of Independence,” *New Political Science*, (1986): 7-15.

²⁶¹ Warner, *Letters of the Republic*, 102.

²⁶² Warner, *Letters of the Republic*, 108.

By the time of the Constitution's creation, such confidence in the universality of language was already receding. Howe's account of Anti-federalist suspicions of Federalist "up-dating" of republican values has been noted above. Howe suggests that by the late eighteenth century confidence in the universality of language was already waning among those forming the Federalists. They increasingly viewed language as historically situated and open to multiple interpretations and so saw it as a weak protection for individual liberties, a position reflected in Madison's oft quoted disdain for "parchment barriers."²⁶³ Such suspicion was, Howe argues, written into the Constitution itself with the inclusion of an amendment process designed to enable the modification of constitutional language.²⁶⁴ Gradually replacing the republican belief in the essential permanence of textual meaning, new notions of the contingency of linguistic meaning were emerging.

Declining faith in the "fixedness" of linguistic meaning had consequences for the manner in which texts could be understood, but it severely mischaracterize the early period of the Republic to suggest it was a period in which all written emanations were problematized. Rather, the period was one in which confidence in language as unproblematic across time weakened. Noah Webster's work in forging American attitudes to language exemplifies the hesitant nature of this movement. On one hand, Webster would decry the "corruptions and errors which prevail in the English language", highlighting regional differences in meaning.²⁶⁵ On the other, he worked to "show how far truth and accuracy of thinking are concerned in a clear understanding of *words*,"²⁶⁶ which is to say that a clear understanding could be assigned to each word. Indeed, his dictionary project (and Johnson's) reflects a belief in the ability to fix, even if temporarily,

²⁶³ Howe, *Language and Political Meaning in Revolutionary America*, 219. James Madison, "The Federalist No. 48," in *PJM digital*.

²⁶⁴ Howe, *Language and Political Meaning in Revolutionary America*, 221.

²⁶⁵ Noah Webster, "Remarks on the English Language", *The Worcester Magazine*, August 19, 1790.

²⁶⁶ Noah Webster, "A Dissertation concerning the Influence of Language on Opinions, and of Opinions on Language" in Noah Webster, *A Collection of Essays and Fugitiv Writings*, Intro. by Robert K. Peters, (Delmar, NY: Scholars' Facsimiles and Reprints, 1977): 222.

the meanings of words.²⁶⁷ Nonetheless, with regards to the Constitution the trend in the early Republic was away from the idea that words (or texts) in themselves could be relied upon to communicate a single universal meaning challenged the republican view and undermined the notion that interpretation, as an active component of reading, has no place in comprehension.

This can be seen in the approaches taken to the Constitution in the main legal commentaries of the period. Starting with Wilson's *Lectures on Law* legal thinking moved steadily away from a trust in the text alone. Wilson projected a vision of a highly participatory society, grounded in his strong belief in the people as the source of sovereign power.²⁶⁸ The Constitution was the creation of the people:

“From their authority the constitution originates: for their safety and felicity it is established: in their hands it is as clay in the hands of the potter: they have the right to mould, to preserve, to improve, to refine, and to finish it as they please.”²⁶⁹

Consequently, it was the people who exercised final authority over the Constitution and provided it with meaning. A key element of the people's authority over the Constitution was that it met the standard that Wilson hoped for all laws – “simplicity and plainness and precision should mark the texture of a law. It claims the *obedience* — it should be level to the *understanding* of all.”²⁷⁰ While Wilson argued that all law should be rescued from complexity that had been foisted upon it, he was pleased to note that “[t]his manner has been already adopted, with success, in the Constitution of the United States.”²⁷¹ Indeed, this simplicity of language ensures the citizen

²⁶⁷ Mark R. Patterson, *Authority, Autonomy, and Representation in American Literature, 1776-1865*, (Princeton: Princeton University Press, 1988), 57.

²⁶⁸ James Wilson, “Lectures on Law” in James Wilson, *Collected Works of James Wilson*, ed. Kermit L. Hall and Mark David Hall, (Indianapolis: Liberty Fund, 2007), 711, 719.

²⁶⁹ Wilson, “Lectures on Law,” 712.

²⁷⁰ Wilson, “Lectures on Law,” 420. This quote and the following are taken from Bird Wilson's “Preface” to the Lectures, in which he reprints James Wilson's letter to the Pennsylvanian House of Representatives, August 24, 1791.

²⁷¹ Wilson, “Lectures on Law,” 422.

“knows those duties and those rights” necessary for fulfilling his role as “a just and an independent part” of the community.²⁷²

Tucker’s 1803 edition of *Blackstone’s Commentaries* shared much the same outlook as Wilson’s *Lectures*. Tucker noted, as Wilson had not in any extended manner, the novelty of America’s use of written constitutions. The writtenness of the Constitution advanced democratic pretensions in Tucker’s view by defining powers such that they could easily be referred to. Without a text

“the disquisition of social rights... is a task, equally above ordinary capacities, and incomparable [sic] with the ordinary pursuits, of the body of the people.”²⁷³

He continues,

“But, as it is necessary to the preservation of a free government... that every man should know his own rights, it is also indispensably necessary that he should be able, on all occasions, to refer to them.”²⁷⁴

While Tucker, given the decade of constitutional debates witnessed by the time of writing, could not be as sanguine as Wilson regarding the simplicity of the text, he nevertheless displayed considerable faith in its permanence of meaning. Equating written-ness with permanence, he declared the United States the herald of a new era in which popular sovereignty might truly exist, in contradistinction to those

“governments whose original foundations cannot be traced to the certain and undeniable criterion of an original written compact whose forms as well as principles are subject to perpetual variation from the usurpations of the strong, or the concessions of the weak; where tradition supplies the place of written evidence; where every new construction is in fact a new edict; and where the

²⁷² Wilson, “Lectures on Law,” 435.

²⁷³ St. George Tucker, “The Editor’s Appendix” in William Blackstone, *Blackstone’s Commentaries: With Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; And of the Commonwealth of Virginia... Volume 1*, ed. St. George Tucker, (Philadelphia: W.Y. Birch and A. Small, 1803): 154-155.

²⁷⁴ Tucker “The Editor’s Appendix,” 155. In another place – “A written constitution has moreover the peculiar advantage of serving as a beacon to apprise the people when their rights and liberties.” Tucker “The Editor’s Appendix,” 20.

fountain of power hath been immemorially transferred from the people, to the usurpers of their natural rights.”²⁷⁵

Admittedly, Tucker’s broader aim, of advancing the Virginian states’ rights mantra, lead him to conceive the Constitution in essentially limiting terms, but despite these ideological commitments, he exhibited a recurring faith in the exactitude of these limits. In drawing on the example of congressional powers, he argues that they are “clearly limited and restrained.”²⁷⁶ The “object” of government

“was defined, it’s principles ascertained; its powers limited, and fixed; its structure organized; and the functions of every part of the machine so clearly designated, as to prevent any interference.”²⁷⁷

Elsewhere powers are “definite,”²⁷⁸ “prescribed,”²⁷⁹ or “defined and limited” in “the visible constitution,” which is to say textual constitution.²⁸⁰ It is by a faith in “the general use of letters” that a people can effectively restrain their government. Echoing Wilson’s commitment to popular sovereignty, Tucker believes that it is text alone that provides the permanency that enables the people to be sovereign. He implicitly assumes that text alone is unchanging, a vehicle for the people’s unchanging delegation of authority.

By the publication of two later flagship commentaries of the pre-Jacksonian republic this faith in the simplicity and fixed nature of constitutional text had ebbed away. In both Kent’s and Story’s works the constitutional text was problematized. For Kent, the minimal text left space for practice and judicial opinion to fill out detail. For Story, however, the text was constrained by the inherent fallibility of human language.

James Kent published the first edition of his *Commentaries on American Law* in 1826 after two decades of developing precedent had progressed the law beyond Tucker’s observations.

²⁷⁵ Tucker “The Editor’s Appendix,” 4.

²⁷⁶ Tucker “The Editor’s Appendix,” 4.

²⁷⁷ Tucker “The Editor’s Appendix,” 154.

²⁷⁸ Tucker “The Editor’s Appendix,” 5.

²⁷⁹ Tucker “The Editor’s Appendix,” 12.

²⁸⁰ Tucker “The Editor’s Appendix,” 19.

Kent, reflecting a more unionist sentiment than Tucker, would see the Constitution not as setting out clear constraints, but rather setting out the broad framework of federal government onto which particularities could be projected over time. Seeking to examine the jurisdiction of the Supreme Court, Kent looked not primarily to the constitutional document for guidance, but established practice and judicial decisions.²⁸¹ The text alone was insufficient to acquire a full meaning of the Constitution. Indeed, Kent conceived of the Constitution as *requiring* construction in order to be applied as a constraint on institutions. The text could not be understood without the intervention of the judiciary:

“The Constitution is the act of the people, speaking in their original character, and defining the permanent conditions of the social alliance; and there can be no doubt on the point with us, that every act of the legislative power, contrary to the true intent and meaning of the Constitution, is absolutely null and void. The judicial department is the proper power in the government to determine whether a statute be or be not constitutional. *The interpretation or construction of the Constitution is as much a judicial act, and requires the exercise of the same legal discretion, as the interpretation or construction of a law.*”²⁸²

Far from the plain and simple Constitution of Wilson, by the late 1820’s the text alone was meaningful only after the application modes of “interpretation.” However, Kent’s *Commentaries* were aimed at the legal profession²⁸³ and presented the Constitution as a facet of the law to be understood, largely spurning the opportunity to grapple with philosophical and theoretical questions arising from the nature of the Constitution itself.²⁸⁴

²⁸¹ “We are to ascertain the true construction of the constitution, and the precise extent of the residuary authorities of the several states, by the declared sense and practice of the governments respectively, when there is no collision; and in all other cases where the question is of a judicial nature, we are to ascertain it by the decisions of the Supreme Court of the United States; and those decisions ought to be studied and universally understood, in respect to all the leading questions of constitutional law.” James Kent, *Commentaries on American Law, Volume I*, (New York: O. Halsted, 1826): 293.

²⁸² Kent, *Commentaries on American Law*, 420-421. My emphasis.

²⁸³ Kent, *Commentaries on American Law*, v.

²⁸⁴ This notion – that the Constitution ought to be subjected to expert “interpretation” provides an important basis for the diversion of judicial modes of constitutional understanding from popular modes explored in the later chapter on Chief Justice Marshall.

By the time Story wrote his 1833 *Commentaries on the Constitution*, in his telling the constitutional text was neither simple nor plain, and as a result an intentionalist-based method of interpretation was required. The fragility of the text itself forced Story to reach for a hermeneutic support, and in so doing he forged a mode of interpretation in which the Philadelphia Convention's claim to authorial authority was implicitly invoked.

While suggesting that the text was central to understanding the Constitution, Story believed that only through a “careful survey of the language of the constitution itself”²⁸⁵ could the meaning be ascertained. Notwithstanding that the document was “made by the people, made for the people, and is responsible to the people”, Story moved in his *Commentaries* to “consider the rules, by which it ought to be interpreted.”²⁸⁶ The move to modes of interpretation is an acknowledgement of the weaknesses of assuming that the text conveys a single meaning without external supports – and a mechanism by which expertise is invoked so as to undermine the people's claim to constitutional authority. Crucially, for Story one could not even suppose that the people at the time of ratification read the text in the same way:

“The constitution was adopted by the people of the United States; and it was submitted to the whole upon a just survey of its provisions, as they stood in the text itself. In different states and in different conventions, different and very opposite objections are known to have prevailed; and might well be presumed to prevail. Opposite interpretations, and different explanations of different provisions, may well be presumed to have been presented in different bodies, to remove local objections, or to win local favour. *And there can be no certainty, either that the different state conventions in ratifying the constitution, gave the same uniform interpretation to its language, or that, even in a single state convention, the same reasoning prevailed with a majority, much less with the whole of the supporters of it.*”²⁸⁷

²⁸⁵ Joseph Story, *Commentaries on the Constitution of the United States; With a Preliminary View of the Constitutional History of the Colonies and States, Before the Adoption of the Constitution*, (Boston: Hilliard, Gray, and Company, 1833): 343.

²⁸⁶ Story, *Commentaries on the Constitution*, 382, 383.

²⁸⁷ Story, *Commentaries on the Constitution*, 388-389. My emphasis.

The cause of variation was, as Madison had noted in *The Federalist*,²⁸⁸ the inherent frailty of human language. Story argued that “the necessary imperfection of all human language” results in words “acquiring different shades of meaning, each of which is equally appropriate, and equally legitimate.”²⁸⁹ The ambiguity of human language is further exacerbated by the passage of time, whereby “[n]o person can fail to remark the gradual deflections in the meanings of words from one age to another.”²⁹⁰ As such the text itself was not an objective standard of meaning.

Despite this, Story was tied to the aim of identifying one authoritative constitutional meaning. Without this single meaning the Constitution would be exposed to fluctuation and the passions of the moment, stripping it of its ability to constrain violations of rights. Without a single meaning the document was open to contestation, subject to capture by whichever group most forcefully articulated its preferred reading.²⁹¹ Shorn of its authority, its ability to maintain the Union was void. For Story, “[t]he constitution is not to be subject to such fluctuations. It is to have a fixed, uniform, permanent construction... the same yesterday, to-day, and for ever.”²⁹² In the face of the weaknesses of language, to fulfill its function the Constitution was required to sustain a single, authoritative interpretation.

To do this he acts *as if* the framers’ authorship is co-equal with the people’s in terms of textual legitimacy but predominant in terms of meaning.²⁹³ To not do so risks the possibility of

²⁸⁸ James Madison, “The Federalist No. 37”

²⁸⁹ Story, *Commentaries on the Constitution*, 437.

²⁹⁰ Story, *Commentaries on the Constitution*, 387.

²⁹¹ For discussion of this point with regard to states’ rights see Story, *Commentaries on the Constitution*, 352-354.

²⁹² Story, *Commentaries on the Constitution*, 410.

²⁹³ Scholarship on Story’s mode of constitutional interpretation, and the *Commentaries* in particular, has come to various conclusions. In no small way due to the complexity of Story’s chapter on constitutional interpretation, subsequent accounts have varied widely on what Story’s core aim was. H. Jefferson Powell has argued that Story was motivated by the “actual and efficient functioning” of the constitutional system, placing the judiciary in the role of creating some akin to an constitutional common law grounded in the

an authoritative meaning, and so he raises the text itself to the level of authority while attributing it to both the framer and the people. However, Story identifies *the intent of the framers* as the guide to constitutional meaning. Where Madison's use of the authors' authority represented a temporary response to the exigencies of ratification, Story's operates as an enabling device for interpretation. Madison had temporally demarked the two meanings of author, but Story utilized their ambiguous relationship to the end of textual exegesis. Where Madison (and his readers) saw constitutional authorship as a two stage process in which the later stage gave "meaning," Story reverses this in reality such that it is the initial stage which provides "intent." The intention of the

constitutional text. Raoul Berger responded critically to Powell's account, conceding that Story did oppose Jefferson's "originalism" but also pointing out that Story advocated the use of multiple sources, prominently including *The Federalist Papers* and the actions of the Philadelphia Convention, in order to identify the meaning of the text. Alternate readings have been offered by James McClellan and Stephen B. Presser, who both posit that Story sought to outline a natural law-based Constitution - although McClellan does note that the Marshall Court bound itself to original intent when known. James W. Ducayet's recent examination of the use of *The Federalist Papers* has concluded that Story sought not framer intent but an "insightful framework of political theory" in utilizing the essays. However, Gary L. McDowell's most recent evaluation of Story argues that, influenced by Francis Lieber's thoughts on the infirmity of language, Story adhered to "originalism" as "a textually based approach to interpreting the fundamental law." Story's biographer, R. Kent Newmyer, characterizes the Justice's view as incorporating a role for the judge, but only when text and framer intent were ambiguous. The argument that I will outline here is that Story followed Madison in marshaling authorial (framer) intent in order to locate definitive meaning, which could then be entrenched by judicial precedent. The significance of the Marshall Court, and Marshall in particular, in his discussion relates to that second movement. It would be disingenuous to claim that Story utilized *only* ideas of framer intent in outlining a system of interpretation, but I would argue, insofar as he sought to negotiate the frailty of constitutional language, framer intent was a crucial tool. Contextualizing the *Commentaries* within a vigorous debate over the states' compact school of "originalism", Newmyer notes Story's nationalizing goal was nonetheless grounded in ideas of framer intent; "It could be argued that this nationalist, capitalist construction of the Constitution only followed the general intent of the framers. Story's *Commentaries*, as we have seen, argued precisely that, and he was probably correct." H. Jefferson Powell, "Joseph Story's *Commentaries* on the Constitution: A Belated Review" *The Yale Law Journal* 94 (1985): 1298; James W. Ducayet, "Publius and Federalism: On the Use and Abuse of *The Federalist* in Constitutional Interpretation", *New York University Law Review* 68 (1993): 830; Gary L. McDowell, *The Language of Law and the Foundations of American Constitutionalism*, (New York: Cambridge University Press, 2010): 363; R. Kent Newmyer, *Supreme Court Justice Joseph Story: Statesman of the Old Republic*, (Chapel Hill, NC: The University of North Carolina Press, 1985): 198; Raoul Berger, "'Original Intention' in Historical Perspective", *George Washington Law Review* 54 (1985): 320-324; Stephen B. Presser, "Some Alarming Aspects of the Legacies of Judicial Review and of John Marshall", *William and Mary Law Review* 43 (2002, No. 4): 1510-1511; James McClellan, *Joseph Story and the American Constitution: A Study in Political and Legal Thought*, (Norman, OK: University of Oklahoma Press, 1971).

authors is to be the guiding principle of constitutional interpretation - and it will be the textual-authors who give meaning to the document.

Story's introduction of the author-function is necessarily disguised, lest he delegitimize the popular Constitution, but his reliance upon it is recurrent throughout the *Commentaries* in his recourse to *The Federalist Papers*. He cites two principal sources in the Preface to the *Commentaries*, the first being *The Federalist Papers* and the second is the jurisprudence of John Marshall. But if Marshall's work "expounded the application and limits or its powers and functions with unrivalled profoundness and felicity," the Chief Justice could do so only by following the work of *The Federalist Papers* "out to their ultimate results and boundaries."²⁹⁴ Marshall builds upon the "incomparable commentary of three of the greatest statesmen of their age" who, with "with admirable fullness and force," laid out the structure and organization of the national government.²⁹⁵ If Marshall is invoked as guiding light in Story's account, it is only so as to bring

"before the reader the true view of its powers maintained by its founders and friends, and confirmed and illustrated by the actual practice of the government."²⁹⁶

Story's goal in his *Commentaries* is emphatically not to present a new mode of constitutional interpretation, but to faithfully articulate the meaning given to the constitutional text by its framers:

"The expositions to be found in the work are less to be regarded, as my own opinions, than as those of the great minds, which framed the Constitution, or which have been from time to time called upon to administer it."²⁹⁷

Story's personal fondness for Marshall leads him to recur to a dual process in describing his work. The framers framed, and Marshall expounded, and each is significant. However,

²⁹⁴ Story, *Commentaries on the Constitution*, v, vi.

²⁹⁵ Story, *Commentaries on the Constitution*, v.

²⁹⁶ Story, *Commentaries on the Constitution*, vi.

²⁹⁷ Story, *Commentaries on the Constitution*, vi.

Marshall's presence in this narrative has no real bearing on Story's later attempt to understand the Constitution only as a text. Marshall's work (here) is post-textual, attempting to wrest a meaning *from* the text. Marshall is himself faced with the same unstable text and the need to delineate a single meaning from it.²⁹⁸ That Marshall, and the Supreme Court, are not regarded by Story as further competitors in the market of constitutional meaning is because their work is to distill the meaning once the authoritative mode of interpretation is identified, not to offer one themselves. To extend the market analogy, the Supreme Court is here the consumer, not the seller, of constitutional meaning. Marshall picks from what is on offer, and applies and then extends its application. For Story, the quality purveyors of constitutional meaning are the framers, and more particularly, the authors of *The Federalist Papers*.

However, as noted, the framers stand in only in an indirect manner. Story acts *as if* the 1787 Convention was the Constitution's author, but repeatedly says that the people are, in fact, the constitutional author. The Constitution is "to be construed, as a *frame*, or *fundamental law* of government, established by the PEOPLE of the United States."²⁹⁹ Nonetheless what guides interpretation is the "view of the constitution [that] was taken by its framers and friends, and was submitted to the people before its adoption."³⁰⁰ Examples of this reasoning are abundant in the text; On popular sovereignty:

"The convention determined, that the fabric of American empire ought to rest and should rest on the solid basis of the consent of the people."³⁰¹

²⁹⁸ Of course Marshall did not face *exactly* the same problem as Story, having been a principal actor within the ratification and so presumably having an already formed conception of what the text meant, at the time of its creation. Moreover, as we shall see in a later chapter, Story's depiction of Marshall as seeking the intent of the framers in his opinions is itself a highly contestable one.

²⁹⁹ Story, *Commentaries on the Constitution*, 393. (original emphasis)

³⁰⁰ With reference to the supremacy of judiciary, supported by four separate citations from *The Federalist Papers*. Story, *Commentaries on the Constitution*, 360.

³⁰¹ Once more supported by four separate citations from *The Federalist Papers*. Story, *Commentaries on the Constitution*, 447.

On the merits of the Preamble:

“There does not seem any reason why, in a fundamental law or constitution of government, an equal attention should not be given to the intention of the framers, as stated in the preamble.”³⁰²

On the power of Congress to tax:

“The constitution was, from its very origin, contemplated to be the frame of a national government, of special and enumerated powers, and not of general and unlimited powers. This is apparent, as will be presently seen, from the history of the proceedings of the convention, which framed it.”³⁰³

And on the issue of a national bank, where Story supposes that the Convention must have shared the (subsequently established) view of its constitutionality, and retroactively applies the “correct” interpretation to the Convention:

“Indeed, it is most manifest, that it never could have been contemplated by the convention, that congress should, in no case, possess the power to erect a corporation.”³⁰⁴

This continual recourse to the convention, while simultaneously proclaiming the Constitution to be created by the people, is in effect the complication of Madison’s carefully erected notion of two-stage authorship. Story offers rhetorical support for the authority of the people, while acting as if the framers are the unifying authority for the text.

Where Madison and his readers could navigate two registers by holding the authors as temporary authorities until the people’s ratification, necessarily temporally distinct, the imperative of the unstable constitutional text and his rejection of the belief that all ratifiers held the same textual understanding leaves Story no such luxury. Story operates within an environment in which authorship and the text are drawn together, locating authority in the authors-of-the-text. It is no longer the people that give meaning to a text written by others –

³⁰² Story, *Commentaries on the Constitution*, 444.

³⁰³ Story, *Commentaries on the Constitution... Volume 2*, 369.

³⁰⁴ Story, *Commentaries on the Constitution... Volume 3*, 133.

Story, reflecting the mindset sketched out by Foucault, uses the authors in order to unify and cohere the text.³⁰⁵ Mapping the burgeoning liberal notion of authorship and a text-centric mode of constitutional interpretation onto the dual notions of authorship, Story breaks down the two-stage model of constitutional founding which vitally underpinned Madison's account. The text is the Constitution, and the textual-authors give it meaning – in determining the correct interpretation of the Constitution one must first turn to the Convention, or more specifically to *The Federalist Papers*.³⁰⁶

³⁰⁵ Story had previously indicated receptiveness to intentionalist approaches to literary criticism. For examples of his attributing texts to the personality of their authors see Joseph Story, "Discourse pronounced at Cambridge, before the Phi Bet Kappa Society, on the Anniversary Celebration, August 31, 1826" in Joseph Story, *The Miscellaneous Writings, Literary, Critical, Juridical, and Political of Joseph Story, LL. D., Now First Collected*, (Boston: James Munroe and Company, 1835): 3-33.

³⁰⁶ However, it would overstate this argument to depict Story as having transcended completely the earlier understanding of the Constitution. Indeed the ideas discussed above only developed gradually. In 1831 Story offered his views on the education of young boys in the science of politics with the statement that:

"In the first place, as to the constitution of the United States; (and similar considerations will apply, with at least equal force, to all state constitutions;) the text is contained in a few pages, and speaks a language, which is generally clear and intelligible to any youth of the higher classes at our common schools, before the close of academic studies. Nay, it may be stated with confidence, that any boy, of ordinary capacity, may be made fully to understand it, between his fourteenth and sixteenth year, if he has an instructor of reasonable ability and qualifications."

But if the text was apparently simple enough for an educated youth to understand, in the same address he offered the earlier view that:

"In the interpretation of constitutional questions alone, a vast field is open for discussion and argument. The text, indeed, is singularly brief and expressive. But that very brevity becomes of itself a source of obscurity; and that very expressiveness, while it gives prominence to the leading objects, leaves an ample space of debatable ground, upon which the champions of all opinions may contend, with alternate victory and defeat."

Perhaps this earlier piece reflects Story's developing ideas, or the beginnings of the realization that the textual Constitution must be inherently unstable. Whatever the position it holds with the trajectory of Story's thought, it is striking the degree to which these two extracts of the same speech contradict each other; the first affirming the "plain and simple" text, the second the weaknesses of America's constitutional language. Joseph Story, "Lecture on the Science of Government; Delivered before the American Institute of Instruction, August, 1831" in Joseph Story, *The Miscellaneous Writings, Literary, Critical, Juridical, and Political of Joseph Story, LL. D., Now First Collected*, (Boston: James Munroe and Company, 1835): 159, 153.

To suggest that Story's conflation of the people-as-author and the framers-as-authors within the realm of *textual* authorship was the final word on the matter would be to overstate the case. Story's move did not radically shift the nature of understandings of the Constitution such that the idea of popular authorship was abandoned. Nonetheless, it did reflect a changing conception of the constitutional text. John Quincy Adams would still be able in 1839 to describe the people as "the authors of the Constitution" and in the same speech suggest that Hamilton was "almost entitled to be called jointly with Madison, the author of the Constitution itself."³⁰⁷ But it would be increasingly less the case that the Constitution was regarded as only comprehensible with recourse to the latter.

Much of the post-Revolutionary history contains something of a temporal serendipity, and in keeping with this it would be exactly fifty years after the Convention wrote the Constitution that its claim to authorship would become the subject of legislative debate. Of all the framers, Madison rose to greatest prominence and was seen as the foremost among them.³⁰⁸ In 1837, the death of Madison had opened up the possibility of acquiring his papers, and it was to Congress that Dolly Madison would offer first refusal. The ensuing Senate debate provided a forum in which Senators laid out their understanding of Madison's, and the framer's, relationship with the Constitution.

On 18th February 1837, Senator Robbins rose to speak on the joint resolution for the purchase of Madison's papers, comparing the founder's work in political science to that of Francis Bacon's on analytics. That comparison, if apt, would alone seem to make Madison's

³⁰⁷ John Quincy Adams, *The Jubilee of the Constitution. A Discourse delivered at the request of the New York Historical Society, in the City of the New York, on Tuesday, the 30th of April 1839*, (New York: Samuel Colman, 1839): 47, 107.

³⁰⁸ Indeed, such was Madison's privileged position that a correspondent to *The Banner of Constitution* in 1830 felt compelled to remind his countrymen "that Mr. Madison was not the sole author of the Federal Constitution." Sulpicius, "Strictures upon the "Commentaries on American Law, by James Kent, Esq. L. L. D." No. XIII", *The Banner of the Constitution*, August 25, 1830, 60.

work worthy of purchase, but Robbins used this only as an introduction to his actual argument. The purchase of Madison's work was necessary for the insight it provided on the Constitution;

“Those who think (if any think) that the result itself – namely, the constitution – of itself and by itself, will be enough for the instruction of mankind on this subject, are much mistaken. For there is a vast difference between the knowledge which is acquired analytically, and that which is acquired synthetically; the latter is but isolated knowledge; the former is knowledge that is the consequence of other knowledge. Synthesis gives to us a general truth, but acquired in a mode that is barren of other fruit; analysis not only gives to us the same general truth, but puts us on the track of invention and discovery....it places us upon an eminence that overtops and overlooks the general truth in the wide survey it commands and gives to us; and as to that general truth, it enables us not only to comprehend it more perfectly, but to apply it more successfully.”³⁰⁹

To know the Constitution perfectly requires not merely exposure to the document, but also an understanding of how and why it was composed such, to know and understand the intentions behind it – to know and understand Madison's intent. Senator Calhoun took the opportunity to welcome the praise of Madison, but also to question the constitutionality of the purchase. While he saved the full force of his argument for the resolution's third reading, he offered the origins of his opposition to Robbin's assertions in intentionalist form - he believed that Madison would have himself regarded the purchase as beyond the powers of Congress.

When debate was reopened on the third reading of the resolution in the Senate, Calhoun would renew his opposition, but the case for purchase (and against) would be even more firmly grounded in arguments assuming the value of intentionalist knowledge of the Constitution. Calhoun's rejection of the constitutional authority to purchase the papers would itself be based on the positions adopted by Madison. Accepting that the “invaluable papers” would throw “a light upon the constitution which had never been shed upon it before,” Calhoun nevertheless questioned the role of Congress in providing for their diffusion. For Calhoun, the “opinions of

³⁰⁹ *Register of Debates in Congress* 13, (Washington: Gales and Seaton, 1837): 851. Robbins would also add that it would also be an appropriate expression of the nation's gratitude to the figure, who aside from Washington, “will ever shine with a purer, with a brighter, [and] more inextinguishable lustre” than the rest of “the constellation... of American worthies.” *Register of Debates in Congress* 13, 852.

Mr. Madison” which were his very “text book... demanded that he should not” abandon his opposition.³¹⁰ Calhoun’s opposition was met by a wall of defiant supporters of the purchase, starting with Senator Preston’s overtly intentionalist stance, in which he declared he was

“by no means disposed to construe the constitution merely by the words it contained, but he through it exceedingly desirable to know the views and intentions of its framers, which must be regarded as the only true spirit of the instrument.”³¹¹

Collapsing any authoritative distance between Madison and the Constitution, Preston would state “that these papers were part and parcel of the constitution.” Webster wholly concurred in the assessment of the value of both a work by Madison and of a record of the intent of the Convention.³¹² Crittenden would suggest the reason he

“was desirous of obtaining this *and all other productions* of Mr. Madison was the conviction that we could nowhere find more light as to the just interpretation of the powers of the constitution.”³¹³

Calhoun was forced to respond, making further recourse to Madison’s intent,³¹⁴ before Senator Rives would, in the last substantive contribution to the debate, refute the problematic nature of the bequests charged by Madison to the manuscripts by invoking the author’s claim to be first among the framers:

“The nation, as the matter stands, are, in fact, his legataries. He has bequeathed to them the constitution, of which he was the chief founder and framer...”³¹⁵

In the vote that followed, the resolution was approved by a vote of 32 to 14.

³¹⁰ *Register of Debates in Congress* 13, 859.

³¹¹ *Register of Debates in Congress* 13, 859-860.

³¹² *Register of Debates in Congress* 13, 861-862.

³¹³ *Register of Debates in Congress* 13, 864. My emphasis.

³¹⁴ “...his regret was yet heightened, because a compliance with her request [Dolly Madison’s] involved a plain and palpable violation of that rule in the interpretation of the constitution which Mr. Madison himself had laid down. ...He then went on in a course of argument to show that the appropriation involved a violation of the principles laid down by Mr. Madison with respect to limited powers.” *Register of Debates in Congress* 13, 866.

³¹⁵ *Register of Debates in Congress* 13, 870.

Interestingly, only one Senator protested the purchase without recourse to Madison's intentions. Senator Niles instead raised the dangers of Congress giving one account of the Constitution the status of being "officially" approved, and of the prospect of that account being subjected to a congressionally-owned copyright and therefore subject to suppress by that single body. "But can Congress take upon itself to decide what political information is proper to be distributed among the people, and then become the publisher and distributor of the works containing the same, at the expense of the national Treasury?" That this objection secured no hold within the debate is perhaps indicative of how strongly the assumption of one single, framer-led interpretation of the Constitution had taken hold.³¹⁶

Throughout the debate operates the assumption that Madison's Papers (and the "Reports" of the Convention contained within them) are of value as a consequence of his privileged position vis-à-vis the Constitution. This position is essentially one of authorship, and it is here that intentionalist textual attitudes are applied to the Constitution. The navigation of a text is understood primarily as an act of retracing the steps of the author and thereby gleaning *their* meaning. While Senator Niles might challenge the wisdom of ascribing such authority to an individual (or group) his is a lone voice, even in opposition to the resolution at hand.³¹⁷ If Story had problematized authorship of the text, the congressional debates of 1837 signaled that substantial resolution would be in favor of the dominance of the author-as-writer as the Constitution's interpretative authority.

Conclusion

³¹⁶ *Register of Debates in Congress* 13, 863. It is striking too, that Niles displays the only resistance to the idea that Madison *has* a copyright to these papers. Throughout the arguments premised on intent is an unquestioned assumption of Madison's authorial property rights.

³¹⁷ See above footnote.

Walter Benjamin's discussion of authorship in the essay "The Author as Producer" suggested that in revolutionary texts the apparent distinction between literary worth and political purpose could be collapsed. Positing that the truly revolutionary text would actually fulfill an organizing function, Benjamin could claim that "a work that exhibits the correct tendency must of necessity have every other quality."³¹⁸ Accepting this premise might render the above discussion of writers and authors irrelevant. If the democratic value of a text is located in its form and content, there would be no requirement for a mechanism by which to popularly approval of a democratic constitution. Neither could appeals to philosophical soundness of the document be abstracted from its claim to speak for the people. But the Americans of the 1780s chose not to commit themselves to ideal of continuous revolutionary struggle that underpins Benjamin's understanding of authorship. Instead they followed Paine's "common sense" advice and installed the law as king.³¹⁹ In doing so they faced the task of purposively writing and enshrining popular constitutions within apparently self-organizing polities. To this end, starting in Massachusetts and carried forth to the federal Constitution, they engaged in a two-step process of constitutional creation in which framers put forth a document for popular, extralegal ratification.

But, as Madison recognized, this commitment to a process of ratification that separates the temporal moment of constitutional document creation from the conferment on it of constitutional authority, leaves the document in a liminal state. In the temporal space between creation and ratification the constitutional document hovers in limbo, lacking popular sanction and vulnerable to revision or fragmentation. In this moment, for Cottee Hanson, Jay, and

³¹⁸ Walter Benjamin, "The Author as Producer" in Walter Benjamin, *Reflections: Essays, Aphorisms, Autobiographical Writings*, ed. with intro. Peter Demetz and trans. Edmund Jephcott, (New York: Schocken Books, 1978), 221.

³¹⁹ Thomas Paine, "Common Sense" in Thomas Paine, *The Thomas Paine Reader*, eds. Michael Foot & Isaac Kramnick, (London: Penguin, 1987), 92.

Madison at least, the articulation of authorial authority is both necessary and proper as a response to dismemberment, an invocation witnessing the as yet undemocratic nature of the document whilst simultaneously anticipating its democratic sanction. However, the quoted Fourth of July narratives suggest that in utilizing a privileged relationship between the framers and the constitutional text, Madison, Jay, and Hanson planted the seeds of a constitutional authority in the author that would calcify as the text of the document became subjected to interpretative debates. The weak claim to authority inherent in the metaphor of a clerk was unable to carry over into the post-ratification world of textual exegesis. The emergence of a veneration for and mythology of the founders that had begun with the Revolution continued to develop, and as it did so it made room and rationale for the framers as great lawgivers. As we have seen, as early as 1810-11, newspaper debates over the renewal of the National Bank's charter were marked by reference to the authoritative intention of the framers. By the 1830s, the notion of the Constitution as the framer's document held such purchase that the President, Martin Van Buren, would affirm his allegiance to this ideal in his inaugural address.³²⁰

³²⁰ Martin Van Buren, "Inaugural Address (March 4, 1837)"

Chapter 3: The Constitution as Authored: The rise of the Founders

*“It is a species of political vanity which leads us to think ourselves wiser in our day and generation than our fathers: and to be unwilling to be guided by their counsels.”*³²¹

*“It is a question in casuistry how long one generation can bind another.”*³²²

Writing the preface to his history of the Constitution in 1854, George Ticknor Curtis tried to assess the significance of his endeavour. His book was a task, he reasoned, unlike that of writing a history of monarchy as the Constitution was “a living code, for the perpetuation of a system of free government, which the people of each succeeding generation must administer for themselves.”³²³ Nonetheless, the transformation of the United States since its founding was due in no small part, in Ticknor Curtis’s estimation, to “the great code of civil government which the fathers of our republic wrought out of the very perils by which they were surrounded.”³²⁴ More than a happy consequence of the Revolution though, Ticknor Curtis saw the Constitution *as* the Revolution:

“Let any man compare the condition of this country at the peace of 1783, and during the four years which followed that event, with its present position... He will see a people who had at first achieved nothing but independence, and had contributed nothing to the cause of free government, but the example of their determination to enjoy it, founding institutions to which mankind may look for hope, for encouragement and light.”³²⁵

³²¹ *Speech of Mr. Miner, of Pennsylvania in Defence of the Constitution, Delivered in the House of Representatives, March 28, 1826*, (Washington: Gales & Seaton, 1826), 14.

³²² “ART. III – Story’s Constitutional Law”, *The North American Review* 38, (January 1834): 67.

³²³ George Ticknor Curtis, *History of the Origins, Formation, and Adoption of the Constitution of the United States; with Notices of its principal Framers, Volume One*, (New York: Harper and Brothers, 1860), x. The preface was written in 1854.

³²⁴ Ticknor Curtis, *History of the Origins, Formation, and Adoption of the Constitution of the United States*, xiv.

³²⁵ Ticknor Curtis, *History of the Origins, Formation, and Adoption of the Constitution of the United States*, xii-xiv.

The Constitution, for Ticknor Curtis, was the American Revolution, and also the cause of the rapid success of the country since then – in only “the span of one mortal life.”³²⁶ Indeed, the continuation of the American polity was intertwined with the fate of the Constitution; “Every line of it is as operative and as binding to-day as it was when the government was first set in motion by its provisions, and no part of it can fall into neglect or decay while that government continues to exist.”³²⁷

Ticknor Curtis’s reflections on the Constitution are laden with apparent contradictions. The Constitution is both “a living code” and composed of lines that are binding and unchangeable. It must be administered by each generation anew, but was wrought out of particular times by particular men. It must be understood in relation to a historicized, storied past, although one that only spans one lifetime. It is, in short, historical and contemporary, mythical and tangible.

These views were not unique to Ticknor Curtis, but reflected a broad social understanding of the Constitution in the middle of the Antebellum period. After the American Revolution, the generation following the revolutionaries was forced to negotiate its relationship with those momentous events.³²⁸ This chapter traces these attitudes through contemporary

³²⁶ Ticknor Curtis, *History of the Origins, Formation, and Adoption of the Constitution of the United States*, xiv.

³²⁷ Ticknor Curtis, *History of the Origins, Formation, and Adoption of the Constitution of the United States*, x-xi.

³²⁸ This generation’s moniker is somewhat disputed. Joyce Appleby has identified them in her own work as the first generation of Americans. At the time, the preferred designation was the “rising” generation, and some scholars have followed this contemporaneous usage. In this chapter I have made use of “second generation” to describe those that came of age after the major events of the founding period and self-identified as the inheritors of its settlement. I do so in order to emphasize their position as actors subsequent to the Revolution and Constitution, and whose sense of (national) identity was informed by it. Joyce Appleby, *Inheriting the Revolution: The First Generation of Americans*, (Cambridge, MA: The Belknap Press of Harvard University Press, 2000); Len Travers, *Celebrating the Fourth: Independence*

discussions and the celebrations on the Fourth of July, illustrating how the second generation's response to this challenge created a political culture in which the Constitution came to be sanctified. This second generation was forced to construct a politics around – for the first time in modernity – the existence of a democratic-republican founding. Republican thought urged the importance of maintaining and returning to the virtue of the founding moment. But if that virtue was ultimately evinced by the act of creating a new republic, how could subsequent generations express such virtue without challenging the institutions of the founding. How could that ultimate virtue be expressed without violating the founding? Borrowing from Levin's notion of "heritage," the chapter will show that in locating themselves in relation to the Revolution the second generation of Americans crafted a mode of national remembrance in which the founding period was held simultaneously immediate and distant.³²⁹ Positioned in what Len Travers has described as a "liminal period,"³³⁰ the founders of the republic and their actions took on a mythical stature against which subsequent actors would assess themselves. Caught between filial loyalty to the founders and a desire for achievements that equaled the fathers', this generation would construe preservation of the Constitution as a heroic act. As such the maintenance of the original Constitution became a gauge of identity with the republican values of the founding. The consequences of these trends were the increasing centrality of the Constitution within American political culture and an understanding of the Constitution itself as closely linked to the individual founders as both the cause of and evidence for their brilliance.³³¹

Day and the Rites of Nationalism in the Early Republic, (Amherst, MA: University of Massachusetts Press, 1997).

³²⁹ For an extensive account of Levin's concept of "heritage" see the discussion below.

³³⁰ Travers, *Celebrating the Fourth*, 57.

³³¹ Ticknor Curtis's account of the Constitution's creation would itself reflect this individualization of the document's history, dedicating approximately a fifth of the 518 page first volume's account of the origin,

The chapter examines responses to the founding, initially by providing a theoretical discussion of the problems presented by an actual founding for republican notions of virtue. It then provides a historical consideration of the manner in which the founding generation sought to manage their legacy. In so doing they began the process of sanctification of the founding which made the republican conceptual problem more acute for second generation Americans. The final section, the bulk of the chapter, traces the subsequent response of the second generation as asserted in Fourth of July orations and toasts.

Republican Foundings and the American Founding

The emerging relationship of the second generation to the Constitution tracks a refocusing of the republican notion of virtue within the early Republic. As the theatre of political action moved from constitutional creation, and to the construction of a political life under the Constitution, so too did civic virtue shift from the capacity to create enduring institutions and to the capacity to maintain them. Echoing, in a different conceptual language, Arendt's observations regarding the meaning of freedom in post-revolutionary periods, the adjustment of republican virtue drew upon lineages analyzed by Pocock but reconfigured them, such that in its Antebellum half-life American civic republican thought made accommodation with and inflected the Jacksonian democracy that would replace it.

Pocock has noted the degree to which the early modern notion of *virtue* emerged from the blending of Christian, Roman, and Greek conceptions. The Roman ideal of *virtus* denoted the “quality of personality that commanded good fortune” as well as the capacity to deal “effectively

formation and adoption to providing profiles of the nine men he believed to be the leading framers. Ticknor Curtis, *History of the Origins, Formation, and Adoption of the Constitution of the United States*.

and nobly with whatever fortune might send.”³³² Initially associated with elite - and particular military - actions, the term intertwined with the Greek *aretē*, “that moral goodness which alone qualified a man for civic capacity,” to create a broad term for the moral goodness of a man situated within a wider cosmos.³³³ Within the thinking of Civic humanists, virtue became politicized, such that the good man was the good citizen, and the virtuous act was that which maintained the structures within which citizenship was possible. Virtue here became associated with the political life and the capacity to live within an interactive *polis*. Virtue stood against fortune insofar as the practice of the former helped sustain the republic against the contingencies that beset it internally and externally.³³⁴ To the extent that these contingencies represented the tangible whim of fortune, Machiavelli’s consideration of *fortuna* and *virtu* could be understood as the attempt to account for the nature of the classical sense of virtue within the post-Augustinian politics of Renaissance Europe. In Pocock’s analysis, *The Prince* reverts to an exploration of the originary Latin concept of virtue as the individual commanding and responding to fortune, exploring the peculiar challenges faced by a new prince outside the framework of citizenship. Machiavelli in *The Prince* is engaging the question of whether the *innovative* prince can ever act with virtue - can political virtue make sense when it forms a break with or reform of a political structure rather than its preservation? *The Discourses*, as a complementing piece, explore the possibility that republican stability can emerge from

³³² J. G. A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition*, (Princeton University Press: Princeton, 1975), 37.

³³³ Pocock, *The Machiavellian Moment*, 37.

³³⁴ Pocock, *The Machiavellian Moment*, 157.

contingency³³⁵ and, crucially for this discussion, the role of the people as guardians of liberty within Rome.³³⁶

Winding down through the Anglo-American discussions of corruption, Court and Country, and commercial empire, Pocock posits that the patriots of American Revolution drew upon the intellectual apparatus of civic republicanism. Following the lead of Bailyn, Wood, and preempting the temporally expansive claims of Banning, Pocock locates the revolutionary spirit of 1787 as outgrowth of the “Country” ideology of the Eighteenth century Anglo-Atlantic community.³³⁷ Concerned with the threat posed by corruption of the political institutions of the British empire to the point of paranoia, the American revolutionaries saw the imposition of commercial regulation and weakening of colonial assemblies as the early signs of a decaying polity and sought “a return to the fundamental principles of British government,” and failing that to “the constitution of the commonwealth itself,” in an attempt to “reconstitute that form of polity in which virtue would be both free and secure.”³³⁸ However, Pocock documents through Gordon Wood the manner in which, post Revolution, the Constitution came to represent a legal order grounded in Madisonian interest, not Jeffersonian virtue, which marked the fading away of the republican ethos in the face of the liberal, commercial deposition that colored the Nineteenth century.³³⁹

³³⁵ Pocock, *The Machiavellian Moment*, 190.

³³⁶ Pocock, *The Machiavellian Moment*, 197.

³³⁷ Pocock, *The Machiavellian Moment*, 506; J. G. A. Pocock, “Virtue and Commerce in the Eighteenth Century,” *The Journal of Interdisciplinary History* 3:1 (1972); Gordon S. Wood, *The Creation of the American Republic, 1776-1787*, (Chapel Hill, NC: University of North Carolina Press, 1969); Bernard Bailyn, *The Ideological Origins of the American Revolution*, (Boston, MA: Belknap Press, 1972); Lance Banning, *The Jeffersonian Persuasion: Evolution of a Party Ideology*, (Ithaca, NY: Cornell University Press, 1978).

³³⁸ Pocock, *The Machiavellian Moment*, 508.

³³⁹ Pocock, *The Machiavellian Moment*, 521-532.

Such accounts of the Constitution - as a thermidor to, not only 1776, but also to the republican ethos itself - chime with more recent scholarly views of the Constitution in the early Republic. From the so-called “Republican revival” to the “neo-progressive” works of Terry Bouton and Woody Holton,³⁴⁰ recent accounts of the founding have depicted the entrenchment of the Constitution as a corresponding loss of agency on the part of the democratic body of the people. Surrounding these arguments is an assumption that in creating an additional layer of government, the institutions bequeathed by the Constitution removed political agency from the people and prized representation, interest, and institutional balance over direct participation, disinterestedness, and dynamic contestation. However, it would be mistaken to understand the early Republic as devoid of contestation and participation. Recent work has emphasized the manner in which the very concept of “the people” provided space for democratic contestation and expansion of the democratic community.³⁴¹ Moreover, the *style* of politics in the early to Antebellum republic continued to display many republican facets. From the toasts as acts of public commemoration and the commitment to the value of oration to widespread militia displays and the robust mobbing of the 1830s, politics in the period was of and for the public space and aimed at the engendering of republican spirit.

And the Constitution was an important symbol within the republican persuasion of politics in this period rather than a check on it. The strongest case for this, and by dint of the argument it makes, the most classically republican articulation of the Constitution, has been offered by Lance

³⁴⁰ Cass R. Sunstein, “Beyond the Republican Revival,” *The Yale Law Journal* 97:8 (1988); Terry Bouton, *Taming Democracy: “The People,” The Founders, and the Troubled Ending of the American Revolution*, (Oxford: Oxford University Press, 2007); Woody Holton, *Unruly Americans and the Origins of the Constitution*, (New York: Hill and Wang, 2007). See also Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review*, (Oxford: Oxford University Press, 2004).

³⁴¹ Jason Frank, *Constituent Moments: Enacting the People in Postrevolutionary America*, (Durham: Duke University Press, 2010).

Banning. Positing that the American founders understood the Constitution as the initial point of institutional balance, Banning reads strict construction as a mode of constitutional interpretation as owing much to republican thought. Banning has suggested that an orientation towards strict construction of the Constitution in the first decade of its operation owed much to republican fears of corruption and decay. Suggesting that a “structured universe of classical thought” provided the medium through which Americans understood political life, Banning argues that for this generation, “almost by definition a constitution was something to protect.”³⁴² Accepting that the “Corruption was the normal direction of constitutional change,” a strict adherence to the text and a willingness to return to it with regularity was necessary to ensure continued liberty.³⁴³ However, there are two important counterpoints to Banning’s narrative. The first is that, as we have seen, strict construction was neither undisputed nor growing in acceptance in the period after 1787-88. Two rival conceptions of the Constitution — as posing a “spirit” and as the work of a particular set of framers — became more important as the Constitution bedded down. The second is that, as Banning himself notes, it was the Anti-federalists rather than the Federalist who were the strongest advocates of strict construction after ratification. That a republican understanding of the Constitution continued to inform Anti-federalist thinking does not negate Wood’s claims that the Federalists were transitioning to a more liberal understanding.³⁴⁴

Nevertheless, the weaknesses of Banning’s claims do not mean that the creation of Constitution is best comprehended as a moment of disjuncture with the republican ethos.

³⁴² Lance Banning, “Republican Ideology and the Triumph of the Constitution, 1789 to 1793,” *The William and Mary Quarterly* 31:2 (1974), 173, 178.

³⁴³ Banning, “Republican Ideology and The Triumph of the Constitution, 1789 to 1793,” 174.

³⁴⁴ Banning notes the Anti-federalist character of this thought at Banning, “Republican Ideology and The Triumph of the Constitution, 1789 to 1793,” 178. For more on the Federalist and Anti-federalists diverging understanding of language cf. John Howe, *Language and Political Meaning in Revolutionary America*, (Amherst: University of Massachusetts Press, 2004).

Numerous observers of the early Republic have noted the endurance of republican modes of political activity and thought.³⁴⁵ As with the debates over liberal and republican notions of authorship,³⁴⁶ it was not the case that classical modes of political thought collapsed suddenly into modern liberal conceptions of the individual and the state.³⁴⁷ Pocock correctly notes that a degree of republican thought connected to innovative virtue of the new prince survived into Antebellum America in the form of the rugged dynamism of the frontiersman and Andrew Jackson's rejection of legal authority of the Supreme Court.³⁴⁸ And while the liberal strands of the revolutionary ethos proved more amenable to the market society emergent in the Nineteenth-century, it was within a partially-republican framework of politics that they evolved. Marvin Meyers's observation that the Jacksonian socio-economic paradox consisted of a movement and society clearing "the path for laissez-faire capitalism and its culture in America" while holding the ideal of "a chaste republican order, resisting the seduction of risk and novelty, greed and extravagance, rapid motion and complex dealings" has in this sense a political parallel.³⁴⁹ For it was in the process of enacting the republican modes of participation, and specifically the defense of a founding, that the Constitution - despite its commitment to representation and interest — became more firmly entrenched within America's political culture. It was not, as Banning

³⁴⁵ Bruce Ackerman quotes Suzanna Sherry on the "historical preplexity surrounding the date when republicanism died in America," with dates ranged from 1787 to the present day. Ackerman, *We The People: Foundations*, 29 fn 45.

³⁴⁶ On these debates for example cf. Oren Bracha, "The ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright", *Yale Law Review* 118, (November 2008); Grantland S. Rice, *The Transformation of Authorship in America*, (Chicago: The University of Chicago Press, 1997); Martha Woodmansee, "The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the Author", *Eighteenth-Century Studies* 17 (Summer 1984); Melissa J. Homestead, *American Women and Literary Property, 1822-1869*, (New York: Cambridge University Press, 2005).

³⁴⁷ And it was equally the case that the Revolution was no more wholly republican in content than the Constitution that emerged from it was wholly liberal. On the importance of liberal strains of thought cf. Isaac Kramnick, *Republicanism and Bourgeois Radicalism: Political Ideology in Late Eighteenth-century England and America*, (Ithaca, NY: Cornell University Press, 1990).

³⁴⁸ Pocock, *The Machiavellian Moment*, 535-537.

³⁴⁹ Marvin Meyers, *The Jacksonian Persuasion: Politics and Belief*, (Stanford, CA: Stanford University Press, 1957), 8.

suggests, that republicanism's substantive commitments made the Constitution important (although to be sure, where they were actualized they did), but rather that the style, the modes, and — perhaps most crucially — the expectations³⁵⁰ of Eighteenth-century republican politics led a greater importance for the Constitution.

In a sense, Banning's argument regarding the republican nature of constitutional preservation is half correct; correct in the sense that republicanism was significant in imparting to the Constitution the latter's importance, wrong in the extent to which he identifies the agents as the Anti-federalists and the symptom as strict construction. In actuality, the agents in the longer term were those segments of the population taking part in public commemorations and the symptom of strict construction was mediated through a desire to preserve the framers' intent. As we shall see, the development of celebrations held on the Fourth of July between 1810 and 1835 saw a shift towards commemorations of the Constitution as well as its increasing association with the framers. Orators and the organizers of celebrations in attempting both to ensure that their own revolutionary acts were remembered appropriately and to use these events to instill republican virtue in the "rising generation," placed the founding at the heart of the United States' republican identity. The virtuous example of the founders was offered as a basis for the cultivation in the people of the qualities necessary to preserve the constituted order. When allied with the second generation's desire to carve out for themselves a world-historic role in the face of inheriting a completed revolution, the result was a posture of "heroic preservation." Heroic preservation meant for the second generation of Americans a commitment to handing on the institutions and Constitution bequeathed to them intact to their children. Faced with the prospect

³⁵⁰ In Meyers' term a *persuasion*: "I have chosen the less formal "persuasion" to fit my emphasis upon a matched set of attitudes, beliefs, projected actions: a half-formulated moral perspective involving emotional commitment." Meyers, *The Jacksonian Persuasion*, 6.

of erosion of the Constitution's protections, this posture was actualized in a fierce commitment to the text *as it was written* by the virtuous fathers of the republic. Shifting from the innovative virtue of the new prince and the framers, Americans came to prize the institutional stability - albeit one born of continual contestation - that enabled the Greek *aretē*.³⁵¹

The result was exemplified in the politics of the 1820s and 1830s marked by appeals to memory, a conceptual division between the few and the people, and a paranoid fear of constitutional erosion. Joel Silbey has characterized the politics of this period as one in which “values and battles from another era remained alive... partisan discussions from the 1820s onward began as the politics of memory and never completely lost that dimension.”³⁵² The political discourse was inflected with concerns over “the fragility and survivability of republican liberty in a world that was hostile and dangerous,”³⁵³ and threats to that liberty were seen in the “unconstitutional” actions of the Second Bank of the United States, the policies of (and opposition to) Jackson, and (as is discussed in Chapters One and Five) discussion of slavery. And, as Machiavelli had suggested in *The Discourses*, the people's guardianship of the constitutional order was seen as the key to avoiding the collapse of the republic. Summarized in a Fourth of July toast offered in Baker's Spring, VA in 1826, the people's continued republican

³⁵¹ Indeed, it might be possible to read de Crevecoeur's quintessential discussion of the American identity and its relationship with land property in this light. The story of Andrew the Hebridean in “What is an American?” is at one level an account of the “great metamorphosis” by which Europeans, “fatigued with luxury, riches and pleasure” undergo a “sort of resurrection” and emerge as Americans - “industrious, exemplary, and useful citizens.” Shedding the Hobbesian assumptions of the monarchical subject, these immigrants transform into republican citizens upon arrival (and success) in America. The finale of the story of Andrew is not his capacity to hold land per se, but the ability to use his landed position to act as a citizen. De Crevecoeur leaves Andrew noting that “The second year he was made overseer of the road, and served on two petty juries, performing all the duties required of him.” In this sense, an American is the individual possessing *aretē*. J. Hector St. John De Crevecoeur, *Letters from an American farmer*, (New York: Duffield, 1904), 79, 87, 77, 88, 117.

³⁵² Joel H. Silbey, *The American Party Battle: Election Campaign Pamphlets 1828-1876: Volume I, 1828-1854*, (Cambridge, MA: Harvard University Press, 1999), 4.

³⁵³ Silbey, *The American Party Battle*, 4-5.

vigilance was the only way to preserve the freedoms secured by the revolutionary fathers; “Republics: Virtue and vigilance their only preservatives: “The people who go to sleep with the Constitution under their heads, will awaken with fetters on their hands”.³⁵⁴ Political leaders were praised for their commitment to protecting the Constitution, and likened to classical heroes - Solon, Cato, even Leonidas. They, in turn, beseeched the people to remember that the “history of our day is... the proper school for American citizens” and to ensure that the American “examples of heroic ardour not excelled by Rome” would “be handed down... for instructions and imitation of our children’s children.”³⁵⁵ Bouyed by this outlook, the Constitution would become an increasingly important symbol within the politics of the early- to mid-Antebellum period - and would equally be increasingly tied to the persons of the framers themselves.

Revolutionary History

The history of the Revolution became of subject of concern for elites almost as soon as it was over. As early as 1790, John Adams would complain in his now renowned comment that,

“The History of our Revolution will be one continued Lye from one end to the other. The essence of the whole will be *that Dr. Franklins electrical Rod, smote the Earth and out sprung General Washington. That Franklin electrified him with his rod – and thence forward these two conducted all Policy, Negotiations, Legislatures and War.*”³⁵⁶

Adams grumble was somewhat self-serving, reflecting a life-long belief that history was treating and would continue to treat his contribution unfairly (see below), but it also points to two themes that emerged from the historical discussions of the revolutionary generation and which would shape the views of the second. The first is that the Revolution was an event of (almost)

³⁵⁴ *Richmond Enquirer*, July 7th 1826.

³⁵⁵ “An Inaugural Discourse, Delivered Before the New-York Historical Society, By the Honourable Gouverneur Morris, (President,) 4th September, 1816,” in *Collections of the New-York Historical Society, For the Year 1821, Volume III*, (New York: E. Bliss and E. White, 1821), 36-37.

³⁵⁶ John Adams to Benjamin Rush, April 4, 1790, in *Old Family Letters, Series A*, ed. Alexander Biddle, (Philadelphia: J. B. Lippincott Company, 1892): 55. Original emphasis.

mythological stature. The second was that it would be narrated through the lens of individuals. These themes did not diminish with distance from the founding, but were consciously fostered by the founding generation. Using history as a didactic tool, the founders encouraged the view of a glorious national history in order to further their nationalist project. At the same time, a republican posture of disinterestedness counter-intuitively stimulated the narration of this history in terms of individuals, as a result of the importance attributed to reputation and character. Both trends left the second generation poised to embrace the Revolution as mythic and individualized, and so come to understand the Constitution in those terms.

It was certainly the case that historical retelling and remembrance – not least that enacted on the anniversary of the 4th of July - emerged as key instruments for the creation of nationalist sentiment in the early Republic.³⁵⁷ Indeed, the legitimating potential of the history of the founding period was certainly understood by contemporaries and, as Peter Messer has documented, history became a theatre within the struggle over the meaning of the Revolution.³⁵⁸ Making use of history as a didactic tool, political and social elites re-conceptualized the narrative of the Revolution, in Messer's telling, so as to marginalize the people's involvement and to link republican virtue to submission to governmental institutions.³⁵⁹

A key aspect of that nascent national history was the Constitution itself. Writing early in the Twentieth century, Frank Schecter described the framers' relationship with the Constitution as being "not merely its authors but also its apostles."³⁶⁰ Active participants in the politics of the newly constituted nation, they worked to encourage the veneration of their achievement, the

³⁵⁷ Cf. David Waldstreicher, *In the midst of perpetual fetes: The making of American nationalism, 1776-1820*, (Chapel Hill, NC: University of North Carolina Press, 1997).

³⁵⁸ Peter C. Messer, *Stories of Independence: Identity, Ideology, and History in Eighteenth-Century America*, (DeKalb, IL: Northern Illinois University Press, 2005).

³⁵⁹ Messer, *Stories of Independence*.

³⁶⁰ Schecter, 'The Early History of the Tradition of the Constitution', 708.

Constitution.³⁶¹ Marshaled as a unifying symbol within the early Republic, the Constitution served to bolster the fragile nationalist sentiment that both elements of the first party system valued. Initially, according to Schechter, a rough coalition of the Federalists, the clergy and the judiciary actively worked to convince the young nation that the Constitution was “fraught with supernal wisdom and endowed with extraordinary intrinsic properties and potentialities.”³⁶² Mobilizing Washington’s personal cache in support of the Constitution,

“the patriots worked hard to celebrate their oneness around the Constitution. The adulation with which they speedily began to praise the work of their leaders was an exercise not only in national self-congratulation but also in the need for unity.”³⁶³

With the success of the Republican push back against central government in 1800, Joyce Appleby contends that a reconceptualized notion of the Constitution was again deployed towards the end of national unity:

“What was left for nationalist sentiment to feed on was an abstract union embodied in a written Constitution. The culture of constitutionalism forthwith took the place of a powerful central government as the nation’s unifier.”³⁶⁴

Conjuring a notion of constitutionalism out of a nation with thirteen constitutions “but not a culture of... constitutionalism”, political elites in the early Republic encouraged veneration of the federal Constitution in order to shore up the new polity.³⁶⁵

³⁶¹ A concern that had exercised Madison in *Federalist No. 49* and again in his 1790 letter to Jefferson; “Would not a Government so often revised become too mutable and novel to retain that share of prejudice in its favor which is a salutary aid to the most rational Government?.” James Madison, “Number 49: The Same Subject Continued With The Same View” in *The Federalist Papers*, ed. Isaac Kramnick, (London: Penguin Books, 1987); James Madison, Letter to Thomas Jefferson, February 4, 1790, in James Madison, *The Mind of the Founder: Sources of the Political Thought of James Madison*, ed. with intro & commentary by Marvin Meyers, (Hanover: University Press of New England, 1981), 176.

³⁶² Schechter, “The Early History of the Tradition of the Constitution”, 719.

³⁶³ Catherine L. Albanese, *Sons of the Fathers: The Civil Religion of the American Revolution*, (Philadelphia: Temple University Press, 1976), 209. See also, Messer, *Stories of Independence*, 159.

³⁶⁴ Joyce Appleby, “The American Heritage: The Heirs and Disinherited” in Joyce Appleby, *A Restless Past: History and the American Public*, (Lanham, MD: Rowman & Littlefield Publishers, Inc., 2005), 79.

³⁶⁵ Appleby, “The American Heritage”, 73.

Attaching events and institutions to certain individuals was deemed part of the wider project of creating good citizens and the Constitution was only partially exempt from this.³⁶⁶ Individual attribution within the creation of the document was complicated by the absence of publicly available convention records and the larger project of emphasizing the unifying popular origin of the Constitution, but despite these issues – or perhaps in light of them – broad attribution to political elites as a group was pursued.³⁶⁷ Messer’s work has shown that, from a constitutional history that emphasized popular participation and deliberation, historians situated within the elite milieu posited the significant figures of the revolutionary cause as leading and forging public sentiment.³⁶⁸ In this narration the Constitution was the culmination of the revolutionary period but one which “place[d] particular emphasis on the role played by the educated part of society.”³⁶⁹ Allied with a source base that relied heavily on Whiggish history of “great men”³⁷⁰ and a burgeoning industry in hagiography,³⁷¹ the American people were well

³⁶⁶ Benjamin Rush would quote approvingly the notion that disturbing a history centered around individuals would reduce the possibility of a cultivated imitation of them. In 1812 he wrote to John Adams,

“The venerable Charles Thomson, now above 80 years of age, now and then calls to see me. I once suggested to him to write secret memoirs of the American Revolution. “No, no,” said he, “I will not. I could not tell the truth without giving great offense. Let the world admire our patriots and heroes. Their supposed talents and virtues (where they were so) by commanding imitation will serve the cause of patriotism and of our country.” I concur in this sentiment, and therefore I *earnestly request* that you will destroy this letter as soon as you read it.”

Benjamin Rush to John Adams, February 12, 1812 in *The Spur of Fame: Dialogues of John Adams and Benjamin Rush, 1805-1813*, Edited John A. Schutz & Douglass Adair, (San Marino, CA: The Huntington Library, 1966), 210. Original emphasis.

³⁶⁷ As Waldstreicher and Warner have separately noted, downplaying the framers’ role was key to the Constitution’s nationalizing end. Waldstreicher, *In the midst of perpetual fetes*, 67-90; “The Constitution’s printedness allows it to emanate from no one in particular, and thus from the people.” Michael Warner, *The Letters of the Republic: Publication and the Public Sphere in Eighteenth-Century America*, (Cambridge, MA: Harvard University Press, 1990), 108.

³⁶⁸ Messer, *Stories of Independence*.

³⁶⁹ Messer, *Stories of Independence*, 146.

³⁷⁰ Sydney G. Fisher, in leading the way in attempting to remove the founders from their pedestals, noted the reliance of early historians on the Whig *Annual Register* – often written by Edmund Burke – in composing revolutionary histories. Key among them was Parson Weems. Sydney G. Fisher, “The

prepped to understand the Constitution in terms of attachment to the founding generation's significant individuals by the time of the second generation's maturity.

The individualization of the historical record also reflected the performative notion of republican disinterest, which worked towards a view of history as composed of great individuals. As Adair has shown, fame and its attainment were understood by the founders in historic rather than immediate terms, and so one's historical position was a significant element in one's satisfaction with achievement.³⁷² But more than historic reputation was at stake. Gordon Wood has suggested that late Eighteenth century American elites saw themselves as integrated within a network of similarly minded peers, through whom they interacted in order to form their own character. Within this web of contacts, they performed a public persona of disinterested gentility in which the independent individual was seen as the bearer of civic virtue. As Wood notes,

“Preoccupied with their honor or their reputation, or, in other words, the way they were represented and viewed by others, these revolutionary leaders inevitably became characters, self-fashioned performers in the theater of life.”³⁷³

As such, the parts they played in the Revolution took on significance in validating their performed identity and lent credence to their self-image. Related to the republic ideal of the

Legendary and Myth-Making Process in Histories of the American Revolution”, *Proceedings of the American Philosophical Society* 51 (April-June 1912).

³⁷¹ Of which Parson Weems's is only the most infamous. Abiel Holmes had published his founder-focused *America Annals* in 1805, but it was also true that more conventional histories indulged in classical allusions which worked to cast the Revolution's leading figures as “classical heroes, unreachable and like the revered ancients, carved of cold white marble.” And the somewhat less conventional history offered by Richard Snowden which aped classical histories in lexicon as well as style. Quote from Eran Shalev, *Rome Reborn on Western Shores: Historical Imagination and the Creation of the American Republic*, (Charlottesville, VA: University of Virginia Press, 2009), 189; Bernstein, *The Founding Fathers Reconsidered*, 124; On Weems cf. George B. Forgie, *Patricide in the House Divided: A Psychological Interpretation of Lincoln and His Age*, (New York: W. W. Norton & Company, 1979), 36-49; On Snowden cf. Shalev, *Rome Reborn on Western Shores*, 202-204.

³⁷² Douglass Adair, “Fame and the Founding Fathers” in Douglass Adair, *Fame and the Founding Fathers: Essays by Douglass Adair*, ed. T. Colbourn, (New York: W. W. Norton & Company, Inc., 1974).

³⁷³ Gordon S. Wood, *Revolutionary Characters: What Made the Founders Different*, (New York: The Penguin Press, 2006), 23.

disinterested individual, the key figures in the founding were discussed in terms of towering classical figures, as individuals whose virtue and achievements echoed antiquity.³⁷⁴ And unlike the classical figure of Solon, they remained present after their achievements to ensure that they were correctly recorded by historians.³⁷⁵

The move by individuals to emphasize their own role created a pressure for understanding the achievements of the Revolution as attachable to individuals or elite groups. Most overt in Adams's written conflict with Mercy Otis Warren, but nonetheless common amongst the founders, was a tendency towards ensuring their own personal story was suitably accentuated – which is to say that individuals were credited with a suitably significant role. Even before his conflict with Warren, Adams had invested himself in a series for the Boston Patriot setting the Hamiltonian record of him straight.³⁷⁶ Other founders, including Jefferson and Madison, saw their papers as a method of compiling their legacy, but were not merely content to wait until their deaths to shape the record.³⁷⁷ Washington's own attempts to manage his image did much to bolster his personal attachment to the Revolution, but John Marshall and Jefferson also engaged in telling the first President's story lest it pass down to posterity in the “wrong” manner.³⁷⁸ As much as these elite figures used history to shape the new nation, they also shaped history to make themselves elite figures.

³⁷⁴ Cf. Shalev, *Rome Reborn on Western Shores*.

³⁷⁵ A disjuncture between classical and modern narrative noted by Frank I. Schechter. Frank I. Schechter, “The Early History of the Tradition of the Constitution” in *American Political Science Review* 9, (Nov. 1915): 708.

³⁷⁶ R. B. Bernstein, *The Founding Fathers Reconsidered*, (Oxford: Oxford University Press, 2009), 121.

³⁷⁷ Bernstein, *The Founding Fathers Reconsidered*, 122-124.

³⁷⁸ On Washington's own efforts see Paul K. Longmore, *The Invention of George Washington*, (Berkeley, CA: University of California Press, 1988). On Marshall and Jefferson cf. David D. Van Tassel, *Recording America's Past: An Interpretation of the Development of Historical Studies in America 1607-1884*, (Chicago: The University of Chicago Press, 1960), 76-84.

These concerns were mirrored in the now famous correspondence between Adams, Jefferson and Rush. Their letters articulate the problems of historical construction and seek validation from their peers (the “intellectual fraternity” that Wood claims operated as the “spectators” of their public character), but they also express a tendency to shape a history of individuals.³⁷⁹ Witness, for example, Rush’s and Adams’s grumbling that Washington and their other *bête noire*, Hamilton, have been depicted as responsible for the acts of a generation. Concerned that individuals were accorded undue credit, they attempted to pour cold water on the aggrandizement of Washington and Hamilton, but nevertheless sought to refine their own reputation amongst their network of peers – in this case, each other. Rush to Adams in 1805;

“The French and American Revolutions differed from each other in many things, but they were alike in one particular – the former gave all its *power* to a single man, the latter all its *fame*.”³⁸⁰

Adams to Rush in the same year;

“The Revolution began in strict exactness from the surrender of Montreal in 1759. It took a gloomy and dreadful form in 1761, so as to convince me at least that it would be inevitable. It continued till 1776, when on the fourth of July it was completed. ...I know, therefore of no fair title that Hamilton has to a revolutionary character. ...Hamilton’s talents have been greatly exaggerated.”³⁸¹

But both were keen to ensure that they received their due individual credit – for example, Adams in September of that year;

“All this you will call vanity and egotism. Such indeed it is. But Jefferson and Hamilton ought not to steal from me my good name and rob me of the reputation of a system which I was born to introduce, “refin’d it first and show’d its use,” as really as Dean Swift did irony.”³⁸²

³⁷⁹ Wood, *Revolutionary Characters*, 24.

³⁸⁰ Benjamin Rush to John Adams, August 14, 1805 in *The Spur of Fame*, 32. Original emphasis.

³⁸¹ John Adams to Benjamin Rush, August 23, 1805 in *The Spur of Fame*, 34-35.

³⁸² John Adams to Benjamin Rush, September 30, 1805 in *The Spur of Fame*, 39.

Exchanging letters in 1815, Adams and Jefferson expressed similar concern over the ability of the documentary history to do justice to the participating individuals.³⁸³ In 1819 a more direct challenge to their personal histories came in the publication of the Mecklenburg Declaration of Independence.³⁸⁴ In passing news of its existence on to Jefferson, Adams sought to use its existence to diminish Tom Paine's contribution to independence in favor of Joseph Hughes's congressional vote and so presumably improve the significance of Adams's own congress-based politicking for independence.³⁸⁵ Jefferson's response was an overbearing barrage of proof that it was in fact a forgery, suggesting that Adams's characterization of the incident as "a charge of Plagiarism against...you, the undoubted, acknowledged draughtsman of the Declaration of Independence" was shared by the Sage of Montcello.³⁸⁶ As with other discrepancies, the point at

³⁸³ In July 1815, Adams wrote to Jefferson (and Thomas McKean),

"Who shall write the history of the American revolution? Who can write it? Who will ever be able to write it?"

The most essential documents, the debates and deliberations in Congress from 1774 to 1783 were all in secret, and are now lost forever. Mr. Dickinson printed a speech, which he said he made in Congress against the Declaration of Independence; but it appeared to me very different from that, which you, and I heard. ...The Orators, while I was in Congress from 1774 to 1778 appeared to me universally extemporaneous, and I have never heard of any committed to writing before or after delivery."

Jefferson replied in August:

"On the subject of the history of the American revolution, you ask Who shall write it? Who can write it? And who ever will be able to write it? Nobody; except merely it's external facts. All it's councils, designs and discussions, having been conducted by Congress with closed doors, and no member, as far as I know, having even made notes of them, these, which are the life and soul of history must for ever be unknown."

John Adams to Thomas Jefferson and Thomas McKean, July 30, 1815 in *The Adams-Jefferson Letters: The Complete Correspondence Between Thomas Jefferson and Abigail and John Adams*, ed. Lester J. Cappon, (Chapel Hill, NC: The University of North Carolina Press, 1987), 451; Thomas Jefferson to John Adams, August 10-11, 1815 in *The Adams-Jefferson Letters*, 452.

³⁸⁴ The Mecklenburg Declaration was first emerged in 1819 and was cited as a basis for Jefferson's Declaration. Jefferson denied knowledge of the Mecklenburg Declaration, and questions remain over the authenticity of it. Cf. Robert M. S. McDonald, "Thomas Jefferson's Changing Reputation as Author of the Declaration of Independence: The First Fifty Years," *Journal of the Early Republic* 19:2 (1999), 187. For the text of the Mecklenburg Declaration see

<http://www.fordham.edu/Halsall/mod/1775mecklenberg.asp>

³⁸⁵ Adams denounced *Common Sense* as "a poor ignorant, Malicious, short-sighted, Crapulous Mass." John Adams to Thomas Jefferson, June 22, 1819, in *The Adams-Jefferson Letters*, 542.

³⁸⁶ Thomas Jefferson to John Adams, August 10-11, 1815 in *The Adams-Jefferson Letters*, 543-544.

issue was personal reputation, but the effect was to form a historical account around individuals' actions.

These two concerns – fashioning a people, and fashioning a public character linked to disinterested achievement – created a deep interest on the part of the founders in the historical record, but it also prepped the second generation to understand the founding as a period of greatness and great individuals. Operating within a cultural understanding of history that had not yet embraced historicism, and which was shifting to Romantic conceptions of history, the second generation came to their understandings of the Revolution and attendant Constitution as great events orchestrated by great individuals.³⁸⁷ Inheriting a conception of the Revolution as located within America's providential exceptionalism, the second generation would see the Constitution as a realization of the *universal* promise of *American* millennialism.³⁸⁸

The Founding and the Second Generation

John Adams to Thomas Jefferson, July 21, 1819, in *The Adams-Jefferson Letters*, 545. Of course another such incident would occur in 1822, when Adams would misremember – or self interestedly reconstruct – the past in regard to the authoring of the Declaration of Independence. Cf. Robert E. McGlone, “Deciphering Memory: John Adams and the Authorship of the Declaration of Independence,” *Journal of American History* 85 (Sept. 1998).

³⁸⁷ Dorothy Ross defines historicism as “the doctrine that all historical phenomena can be understood historically, that all events in historical time can be explained by prior events in historical time”, and suggests it would only be gradually accepted in America over the course of the Nineteenth century. Dorothy Ross, “Historical Consciousness in Nineteenth-century America”, *The American Historical Review* 89, (Oct. 1984): 910. On the Romantic trend in American history cf. Arthur H. Shaffer, *The Politics of History: Writing the History of the American Revolution 1783-1815*, (Chicago: Precedent Publishing, 1975), 177.

³⁸⁸ In doing so they drew on notions of both a divine mission and a secular responsibility. “O! receive the fugitive, and prepare in time an asylum for mankind.” Thomas Paine, “Common Sense” in Thomas Paine, *The Thomas Paine Reader*, eds. Michael Foot & Isaac Kramnick, (London: Penguin, 1987), 93; Sacvan Bercovitch, *The Rites of Assent: Transformations in the Symbolic Construction of America*, (New York: Routledge, 1993); Sacvan Bercovitch, *The American Jeremiad*, (Madison, WI: The University of Wisconsin Press, 1978).

Despite the best efforts of the founding generation to shape the history of it, many contemporary historians see the second generation as key actors within this process. Even Bercovitch, perhaps most committed of all American watchers to the ease with which the Revolution was wielded to notions of divine mission, contends that the sanctifying of the Revolution unfolded over a “generation or so.”³⁸⁹ Catherine Albanese links it to “a “winding down” of patriotism” following the founding, while Michael Kammen suggests constitutional veneration did not gain momentum until the 1850s.³⁹⁰ For scholars of the period, the shift from the revolutionary generation to its successors is a crucial moment in the fashioning of veneration for the Revolution. Edward Tang has, for example, suggested that it was the engagement between generations that engendered the collective memory of the Revolution;

“Existing together within the same historical moment, the revolutionary and post-revolutionary generations conceived, disputed, and transformed the larger, malleable culture that simultaneously enmeshed them with the nineteenth century.”³⁹¹

Other historians have noted the significance of the 1820s, and particularly 1826, within this process. For Mercieca, the year of Jefferson’s and Adams’s deaths marked the second generation’s arrival and the conflation of what she has labeled the American romantic and tragic

³⁸⁹ Bercovitch, *The Rites of Assent*, 165.

³⁹⁰ Albanese, *Sons of the Fathers*, 9; Michael Kammen, *A Machine That Would Go of Itself: The Constitution in American Culture*, (New York: First Vintage Books, 1987), 22, 94. Kammen notes that there is divided opinion on this however. Alternatively, the constitutional scholar Edward Corwin would mourn the demise of Constitution worship in 1920, laying the blame squarely on Lincoln’s willingness to place expediency (and the Union) over constitutional observation – describing the period after the Civil War Corwin stated with pessimism that “Henceforth it was the people’s law, and must meet their need.” Edward Corwin, “The Worship of the Constitution” in *Corwin on the Constitution: Volume One, The Foundations of American Constitutional and Political Thought, the Powers of Congress, and the President’s Power of Removal*, ed. with intro Richard Loss, (Ithaca, NY: Cornell University Press, 1981), 55.

³⁹¹ Edward Tang, “Writing the American Revolution: War Veterans in the Nineteenth-Century Cultural Memory”, *Journal of American Studies* 32 (1998): 64.

story arcs.³⁹² For Burstein, 1826 was a “watershed”, that built upon Lafayette’s visit, and in which all Americans agreed that “homage should be paid to the their Revolutionary origins.”³⁹³ Others though, have seen the arrival of the second generation’s maturity, rather than 1826 per se, as the decisive moment in the forging of the Revolution’s history. Wood sees the founders’ place in history settled before 1826; “The succeeding generations of Americans were unable to look back at the revolutionary leaders and constitution makers without being overawed by the brilliance of their achievement.”³⁹⁴ In this he follows Forgie, who saw the Revolution coming down “to the post-heroic generation as a cosmic, half-fabulous occurrence.”³⁹⁵

That the second generation would be central in giving historical meaning to the founding is perhaps not surprising, as they were most implicated in a process of coming to terms with it as a legacy. Writers have long noted the difficult position that the second generation of Americans found itself in. Hermann Von Holst’s account of the constitutional history of the United States, which became available in English in 1876, identified the universalist tendency of the American Revolution as a source of both destructive energy and ultimate stagnation. The Enlightenment-

³⁹² Jennifer R. Mercieca, *Founding Fictions*, (Tuscaloosa, AL: The University of Alabama Press, 2010).

³⁹³ Andrew Burstein, *America’s Jubilee*, (New York: Alfred A. Knopf, 2001), 5, 6. Also cf. Bercovitch, *The Rites of Assent*, 172; Burstein describes Lafayette’s visit as itself “a moment of self-conscious thanksgiving... an act of naming – and thereby moving past – a heroic age” (32).

³⁹⁴ Wood, *Revolutionary Characters*, 4.

³⁹⁵ Forgie, *Patricide in the House Divided*, 20. Even amongst the young Federalists who grappled with the role of the individual in Whiggish histories, and suggested that revolutionary characters were able to shape events only to a very limited extent, Foletta finds Edward Everett willing to forge a revolutionary history of great men, albeit one in which steps back from hagiography. Marshall Foletta, *Coming to Terms with Democracy: Federalist Intellectuals and the Shaping of an American Culture*, (Charlottesville, VA: University of Virginia Press, 2001), 205. In a *North American Review* article of 1826, (which Foletta attributes to Everett) Everett would write,

“It is one of the characteristics of a crisis like our Revolution, that it produces an astonishing development of talent and resource, among all classes of the community. It not only stimulates the energy of many cultivated minds, but it elevates out of common life innumerable individuals, who, in more tranquil period, are lost to all but the duties and calls of physical existence.”

“Art. VI. Memoir of the Life of Richard Henry Lee” in *The North American Review* 22, (April 1826): 375-376.

inspired ideal of an abstractly formulated system of government uprooted what was framed as centuries of “monkish” and aristocratic custom, denouncing “as a weak and a damnable species of commerce with the injustice of a thousand years” that which conflicted with the new order.³⁹⁶ At the same time however, the adoption of a philosophy grounded in abstract perfectibility was to

“declare stagnation the natural condition of all social and political order. If the principles were to be unchangeable, incapable of refinement and progress, *there would be no possibility of development*, for principles are only the quintessence of the aggregate intellectual and moral knowledge of a people or of the age, reduced to the simplest formula.”³⁹⁷

The Revolution promised to liberate every generation from the oppression of historical custom, but replaced it with a claimed universal order that denied the possibility of substantively improving it. Only by rejecting the universal order proposed could subsequent individuals enact the freedom from historical restraint that the Revolution had delivered. In the context of the United States, this legacy of the Revolution proclaimed the freedom of posterity, while demanding filial obedience to the revolutionary act. David Lowenthal has argued that this created a Janus-like approach to history amongst the first Americans; “On one hand, freedom from the encumbering past was a virtual dogma of the Revolution and the new republic; on the other, Americans... reverently protected the Founding Fathers’ achievements.”³⁹⁸ Caught between a promise of generational sovereignty and a culture that called for veneration of the founding past, Americans could be forgiven for sharing Hawthorne’s assessment of their relationship with the founders – “let us thank God for having given us such ancestors, and let

³⁹⁶ Hermann Von Holst, *The Constitutional and Political History of the United States: 1750-1833, State Sovereignty and Slavery*, Trans. John L. Lalor & Alfred B. Mason, (Chicago: Callaghan and Company, 1876), 68.

³⁹⁷ Von Holst, *Constitutional and Political History of the United States*, 68-69. My emphasis.

³⁹⁸ David Lowenthal, *The Past is a Foreign Country*, (New York: Cambridge University Press, 1985), 105.

each successive generation thank him not less fervently, for being one step further from them in the march of the ages.”³⁹⁹

As a result the post-revolutionary generation in early American Republic were presented with a dilemma. Heirs to this “democratic” revolution, they had the choice of accepting or rejecting the founding. In accepting the founding this generation conceded that they lived in the shadow of greatness, and forwent their own opportunity for participation in the act of democratic creation. To accept was to affirm the Revolution’s own narrative, of a world-historic intervention

“which to the end of time must be an honor to the age that accomplished it: and which has contributed more to enlighten the world, and diffuse a spirit of freedom and liberality among mankind, than any human event (*if this may be called one*) that ever preceded it.”⁴⁰⁰

A revolution, led by the “illustrious saviour... sublime example of virtue” Washington, which was “destined... to enlighten a benighted world” and “to change the whole order of political opinion.”⁴⁰¹ The alternative – rejection – was to reject all that bound the revolutionary narrative together - the virtue of Washington and the patriots, the enlightening of mankind, and the role of providence in the fate of America. It was to question, even perhaps to problematize the supreme virtue of the founders⁴⁰² and/or America’s divine mission.⁴⁰³ In the still young Republic in

³⁹⁹ Hawthorne in 1849, quoted in Lowenthal, *The Past is a Foreign Country*, 113.

⁴⁰⁰ Thomas Paine, “The Crisis: No. 13” [1783] in Thomas Paine, *Common Sense and The Crisis*, (New York: Dolphin Books, 1960), 226. My emphasis.

⁴⁰¹ Archibald Buchanan, *An Oration Composed and Delivered at the Request of the Republican Society of Baltimore, on the Fourth of July, One Thousand Seven Hundred and Ninety-Four*, (Baltimore: Clayland, Dobbin and Co., 1795), 36, 3.

⁴⁰² On this topic see J. G. A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition*, (Princeton, NJ: Princeton University Press, 1975); Lance Banning, *The Jeffersonian Persuasion: Evolution of a Party Ideology*, (Ithaca, NY: Cornell University Press, 1978).

⁴⁰³ On the idea of America’s providential mission see Bercovitch, *The Rites of Assent*. Also Bercovitch, *The American Jeremiad*.

which, we have seen, national political culture centered on commemorations of the virtue of the Revolution and revolutionaries⁴⁰⁴ such a step was daunting if not impossible.

Situated in what Forgie has labeled the “post-heroic” age the second generation were forced to negotiate their own relationship with the Revolution against this backdrop.⁴⁰⁵ As Adair’s discussion of the changing attitudes towards fame during the founding era concluded, for individuals at the turn of Nineteenth century the act of creating a state was seen to be amongst the highest possible achievements.⁴⁰⁶ However, for the second generation of Americans, this possibility could only be realized at the expense of the revolutionary settlement itself. In Lowenthal’s words, they

“could not resemble the Founding Fathers without endangering their [the fathers’] legacy, or preserve it without acknowledging their [own] subordination. Simply to save their legacy relegated them to everlasting inferiority as sons unable to act on their own.”⁴⁰⁷

Given the “fact” of the Revolution, the second generation had to concede that, in Daniel Webster’s construction, they could

“win no laurels in a war for independence. Earlier and worthier hands have gathered them all. Nor are there places for us by the side of Solon, and Alfred, and other founders of states. Our fathers have filled them.”⁴⁰⁸

Loyal to the founding, the actors of the post-heroic age had the challenge of forging a meaningful role for themselves within the constraints of the existing revolutionary settlement.

It was in the response of the second generation to this situation that a history of the founding privileging the Constitution and the attachment of the founding generation to it was

⁴⁰⁴ Waldstreicher, *In the Midst of Perpetual Fetes*.

⁴⁰⁵ Forgie, *Patricide in the House Divided*. Forgie dates the “post-heroic” age from the mid-1820s, but as the discussion below will demonstrate I argue that attempts to address the problems faced by a “post-heroic” age are evinced by the mid-1810s.

⁴⁰⁶ Adair, “Fame and the Founding Fathers.”

⁴⁰⁷ Lowenthal, *The Past is a Foreign Country*, 118.

⁴⁰⁸ Daniel Webster speaking in 1825, quoted in Forgie, *Patricide in the House Divided*, 55.

forged. The second generation attempted to navigate the challenges presented by their paternal legacy with a variety of strategies before settling on one somewhat akin to what Daniel Levin, in his consideration of modern doctrines of original intent, has defined as “heritage.”⁴⁰⁹ In so doing, this generation was able to assert its generational sovereignty without challenging the revolutionary narrative. But as a consequence of this, they privileged an understanding of the Constitution as being both a product of founders as a partial group and as an object worthy of veneration itself.

Heritage and History

Daniel Levin’s consideration of original intent seeks to draw parallels between that doctrine of constitutional interpretation and a particular manner of historical representation that works to reduce and contort the relationship between past and present. Pointing to Independence Hall as a pertinent example, Levin suggests that the hall as it currently stands has little in common with the hall in which the Declaration of Independence was adopted. As a consequence of ideologically motivated renovation and aesthetic landscaping, Independence Hall would more likely provoke perplexity than recognition should a freshly reincarnated Benjamin Franklin pass down Philadelphia’s Chestnut Street. For Levin, the modification and manipulation of Independence Hall’s environment represents an example of “heritage”, as “the representation of

⁴⁰⁹ Daniel Levin, “Federalists in the Attic: Original Intent, the Heritage Movement, and Democratic Theory”, *Law & Society* 29 (2004): 105-126. In a similar way, Jill Lepore has documented the attitude of “antihistory” amongst members of the current TEA party movements: “In antihistory, time is an illusion. Either we’re there, two hundred years ago, or they’re here, among us. When Congress began debating an overhaul of the health care system, this, apparently, was very distressing to the Founding Fathers. “The founders are here today,” said John Ridpath of the Ayn Rand Institute, at a Boston Tea Party rally on the Common on the Fourth of July. “They’re all around us.”” Jill Lepore, *The Whites of Their Eyes: The Tea Party’s Revolution and the Battle over American History*, (Princeton: Princeton University Press, 2010).

the past as a useful source of contemporary moral instruction.”⁴¹⁰ Crucially, heritage “has many characteristics, but among its most important is its ability to strip away the mediation of time and gradual change and thereby present the past as immediate and understandable.”⁴¹¹

Within Levin’s account, the rendering of the past as immediate works to enable modern individuals to identify with historic points in time without the requirement of recognizing the necessary disjuncture between any two non-continuous temporal moments. As a political tool, heritage operates “to emphasize the continuity of values rather than political struggle or social and institutional change.”⁴¹² It also asserts “not only [that] we can “know” the past, but ...[also] the conceit that the past is a “real thing” with integrity and unity that belongs to itself, rather than an interpretation of the past by moderns.”⁴¹³

Levin hopes to draw attention to the tendency of advocates of original intent to treat the creation of the Constitution as something immediately accessible and ultimately knowable without recognizing the historical gulf between today and 1787-88. But as a theory of historical reception, heritage points to a dual tendency that Levin sought to highlight with his choice of title. Echoing Tony Horwitz’s account of Civil War re-enactors, *Confederates in the Attic*, the essay’s title sets up Levin to lambast those individuals who seek to replicate historic battles. Noting the propensity of these enactors to adopt a level of authenticity which risks their health, Levin deems their efforts a “denial of the progress that has been made” and a “negation of one’s

⁴¹⁰ Levin “Federalists in the Attic”, 106.

⁴¹¹ Levin “Federalists in the Attic”, 106.

⁴¹² Levin “Federalists in the Attic”, 111.

⁴¹³ Levin “Federalists in the Attic”, 112.

historical self as much as [the assumption of] an identity from another time.”⁴¹⁴ What looks “like a genuine interest in history, ...[is] actually a denial of history.”⁴¹⁵

Frozen in “history,” this mode of heritage enables its subscribers to cleave from the past the present they wish to commemorate. Re-enactors are freed from the need to contemplate the causes or consequences of the Civil War, much less to accept the mindset of a confederate soldier beyond his battlefield concerns. Instead, they can make immediate the perceived valor of the confederate army, while historicizing their racist cause. Separating the historical period from the flow of history, “heritage” empowers the current generation to make immediate what they wish, while making distant what they would rather not deal with.

For the second generation of Americans, born into the shadow of the great patriots of the Revolution, heritage offered a strategy by which to hold the Revolution both immediate and distant, enabling them to hold it forth as legacy and an example, without it also operating to highlight the lesser role that the generation was destined to play. Distorting the temporal distance between themselves and the founding, the second generation emphasized the connection of the founding to the past and exaggerated the distance between 1776 and their existence in the Early Republic. By dislocating the Revolution’s position in time in this way, this generation could position the founding as being of another era and so shape their own role as being necessarily different, but not necessarily lesser – a different era would after all call for a different response. At the same time however, the Revolution was firmly rooted in America’s past and given an immediacy that allowed the current generation to identify with, and claim symbolic unity with, the Revolution and the revolutionary generation. Made continually fresh and in unity with the present, the revolutionary virtue could be an inspiration for and a characteristic of the

⁴¹⁴ Levin “Federalists in the Attic”, 122.

⁴¹⁵ Levin “Federalists in the Attic”, 122.

contemporaneous generation. Taking the founding out of time and simultaneously making it immediately locatable, the second generation relieved themselves of a direct comparison to the founders while remaining loyal witnesses to the founding.⁴¹⁶

Fourth of July

The practice of using the Fourth of July as ritual of commemoration was well established very early in the Republic's history. Tracing these celebrations from the middle of the early Republic until the mid-1830s, a pattern of strategic engagement with the past emerges, culminating in the adoption of "heritage" as a method of relating to the revolutionary period.

By the end of eighteenth century Fourth of July Addresses began to engage with the transition from a revolutionary to a post-revolutionary generation. While at times, the Revolution was still viewed as the work of the speaker and audience ("...those blessings for which *you* have toiled and bled")⁴¹⁷ or at least conceptualized as their own,⁴¹⁸ it was equally the case that at times it was not. Noah Webster, despite being eighteen in 1776 and therefore holding a strong claim to being present at the Revolution, was among the vanguard in moving beyond the revolutionary generation. By as early as 1798 he identified himself and his audience as sons of the

⁴¹⁶ Forgie noted this dual tendency within his own account, suggesting that "[o]n one hand, the War for Independence came down to the post-heroic generation as a cosmic, half-fabulous occurrence, whose events appeared 'so strange and heroic that they resemble ingenious fables, or the dreams of romance, rather than the realities of authentic history'" and "[o]n the hand, the Revolution was as close and as commonplace as the people one loved." However, for Forgie, this duality is not discussed in terms of a necessary or chosen strategy, but rather as a material fact of the early Republic to be observed. Forgie, *Patricide in the House Divided*, 20-21.

⁴¹⁷ John Callender, *An Oration, Pronounced July, 4, 1797, at the Request of the Town of Boston, in Commemoration of the Anniversary of American Independence*, (Boston: Benjamin Edes, 1797), 14. My emphasis.

⁴¹⁸ Buchanan, *An Oration*.

revolutionary patriots,⁴¹⁹ and in 1802 he had deposited “[m]ost of the civil and military characters, conspicuous in the revolution... in their graves.”⁴²⁰ While faster than most⁴²¹ Webster was only anticipating a trend that would gather speed with time. In time the theme of aging revolutionaries and their gradual loss to the grave would emerge. An 1808 Savannah oratory would note the ongoing demise of the revolutionary generation and the emergence of a second, in its effort “to inspire [the second] with gratitude to the sages, and heroes of our revolution, whether they now “sleep the sleep of death,” or still live to bless and to protect our country.”⁴²² Another orator would offer tribute “to the manes [spirits] of those departed Heroes.”⁴²³ A year later Joel Barlow would echo these sentiments and lament that “[t]he present race is... passing away.”⁴²⁴

The acceleration of this trend and the renewal of conflict with Britain in 1812 pushed the question of the second generation’s relationship to the Revolution to the fore. The War of 1812

⁴¹⁹ “...our fathers were *men* – they were heroes and patriots...” Webster, *An Oration...1798*, 16.

⁴²⁰ Noah Webster, *An Oration, Pronounced before the Citizens of New Haven, on the Anniversary of the Declaration of Independence; July, 1802. And Published at their Request*, (New Haven, Conn.: William W. Morse, 1802), 6.

⁴²¹ In 1803 Samuel Elliot would state that “[o]ur fathers witnessed the critical conjuncture with heroic fortitude” but list them as including Jefferson, Madison, Gallatin, Ames, Livingston and Marshall, before detailing their involvement in the politics of the early Republic suggesting that many significant figures did survive. Samuel Elliot, *An Oration Pronounced at West-Springfield, (Mass.) July Fourth, Eighteen Hundred and Three*, (Bennington: A. Haswell & Co., 1803), 5. In the same year at the other end of the continent, Daniel D’Oyley would embrace “the solicitations [sic] of those of my brother Soldiers, who remain to brighten the ardent affection, that bound *us* together in *our* revolutionary struggles.” Daniel D’Oyley, *An Oration, Delivered in St. Michael’s Church Before the Inhabitants of Charleston, South-Carolina, On the Fourth of July, 1803; In Commemoration of American Independence*, (Charleston, SC: T. B. Bowen, 1803), 1.

⁴²² Col. John Macpherson Berrien, *An Oration, Commemorative of the Anniversary of American Independence. Delivered as the Baptist Church in Savannah*, (Savannah: Seymour & Woolhopter, 1808), 7. Hair appeared as a symbolic measure of the generation’s passing, with the “grey-headed patriot of ‘76” turning into the “whitened locks that still wave among us.” Gardiner, *An Oration... 1807*, 15; Joel Barlow, *Oration Delivered at Washington, July Fourth, 1809; at the Request of the Democratic Citizens of the District of Columbia*, (Washington City: R. C. Weightman, 1809), 4.

⁴²³ Captain James Marshall, *An Oration, Commemorative of the Anniversary of American Independence, Delivered as the Filature, in Savannah*, (Savannah: Seymour & Woolhopter, 1808), 10.

⁴²⁴ Barlow, *Oration*, 4.

would prove to be something of a pivotal moment in this process. The mobilization highlighted the fact that most patriots of '76 were no longer of fighting age.⁴²⁵ The observation that “[m]any who are now present were then unborn. Many who are now present were so young as to have but little political knowledge – but a feeble sense of the situation in the country [then]”,⁴²⁶ prompted concern and reflection. For some the realization led to a fear that the Revolution was imperiled without the presence of the patriots – for without their virtue how could the nation survive?⁴²⁷ Others, though, saw the possibility of infusing the next generation with the virtue of their fathers.⁴²⁸

To many amongst the second generation the War of 1812 offered the prospect of displaying their equal to the revolutionary generation. Framing the war as a sequel to the Revolution, Addresses put forward the idea that 1812 marked a second world-historical battle for liberty against the old foe of 1776. The war was “but a struggle for our indisputable rights... a righteous cause – it was the common cause of mankind.”⁴²⁹ Its successful execution demonstrated “that the spirit which animated our sires, is retained with undiminished lustre.”⁴³⁰ The War of 1812 proved that the second generation were “not an unworthy offspring of patriot

⁴²⁵ Although some, notable among them Andrew Jackson, did fight in both conflicts.

⁴²⁶ John Barnet, *An Oration, Delivered at Amenia in Union Society, July 4, 1812, to an Assemblage of Citizens, met to Celebrate the Birth-Day of Our Republic*, (Poughkeepsie, New York: C. C. Adams, 1812), 7.

⁴²⁷ “Where are the patriots of our revolution? Where are the sons and disciples of Washington?” Festus Foster, *An Oration Pronounced at Hardwick, July 4th, 1812, Being the Thirty-Sixth Anniversary of American Independence*, (Brookfield: E. Merriam & Co., 1812), 16.

⁴²⁸ “We have no hope of political salvation, but in a return to his [Washington’s] principles and measures. ... The Spirit of the Fathers may even now save the Sons.” Samuel C. Allen, *An Oration, Delivered at Greenfield, July 6, 1812: In Commemoration of American Independence; at the Request of the Washington Benevolent Societies, of the County of Franklin*, (Greenfield, Mass.: Denio and Phelps, 1812), 20-21.

⁴²⁹ Samuel Berrian, *An Oration, Delivered before The Tammany Society, or Columbian Order, Hibernian Provident, Columbian, and Shipwright’s Societies, in the City of New-York, on the Fourth Day of July, 1815*, (New York: John Low, 1815), 9.

⁴³⁰ Adoniram Chandler, *An Oration, Delivered before the New-York Typographical Society, on their Seventh Anniversary, July 4, 1816*, (New York: J. Seymour, 1816), 8.

fathers. The holy flame of the revolution was again rekindled.”⁴³¹ The war offered its own “immortal” victories and heroes - Perry, Pike, Lawrence, and above all Jackson⁴³² - and for some, this struggle and these heroes equalled the Revolution.⁴³³

Framing the War of 1812 this way enabled the second generation to assert that they were equal to the exertions of the founders. By re-fighting the Revolutionary War, the second generation could lay claim to equality with the patriots of 1776 without repudiating that generation’s founding order. Jackson could be Washington’s equal without *unfounding* Washington’s legacy. The past would not shape the present, for the present was responsible for its continued reign. Forcing an identity between 1776 and 1812, the orators of the mid-1810s enabled the second generation to look the first in the metaphorical eye.

However, as a solution to the second generation’s problem this conceptual apparatus could only subsist as long as the identity between 1776 and 1812 was accepted. Such an identity sat ill with the notion that the Revolution had “no parallel in the history of the world.”⁴³⁴ Moreover, after the enthusiasm of war had subsided it was difficult to maintain that 1812 was an event on a par with the Revolution. Instead of 1776’s equal, 1812 was soon relegated to a

⁴³¹ Leonard M. Parker, *An Oration, Pronounced at Charlestown, Massachusetts, on the Fourth of July, A. D. 1816. By Request of the Citizens of Middlesex County, Being the Fortieth Anniversary of American Independence*, (Boston: Rowe and Hooper, 1816), 7.

⁴³² Jackson would be drafted into such narratives in the place of Washington, and offered similar praise. Such was the imperative of praising the “Leonidas of America” that one South Carolinian speaker could in seriousness claim that “[t]he most renowned exploits of an Alexander, a Caesar or even a Bonaparte, are totally eclipsed by the superior splendor of his triumph at New-Orleans.” Alexander MacLeod, *An Oration; Delivered at Georgetown, (S. C.) on the 4th Day of July, 1816*, (Georgetown, SC: E. Waterman, 1816);, 12.

⁴³³ “The campaign of the year preceding the peace excelling in prodigies of valor and in the momentous consequences of our victory equalled even the wonders of the revolution.” William Lance, *An Oration, Delivered on the Fourth of July, 1816, In St. Michael’s Church, S. C. By Appointment of the ’76 Association*, (Charleston, SC: Office of the Southern Patriot, 1816), 15. Others would equate the honor due to the fallen with that of those lost in the Revolution; “*Departed shades! All the honours due to the heroes, who fell in the war of the revolution, are yours! What more can we say?.*” Parker, *An Oration*, 7.

⁴³⁴ James N. Barker, *An Oration, Delivered at Philadelphia Vauxhall Gardens, on the Forty-First Anniversary of American Independence*, (Philadelphia: John Binns, 1817), 3.

defense of⁴³⁵ or a support for⁴³⁶ the Revolution, and with this regulation returned the question of the inability of the second generation to equal the feats of their fathers. But if this particular strategy failed, it did point to a manner in which the second generation could maintain the revolutionary settlement without accepting their inferior status.

The notion that the War of 1812 had been a defense of the Revolution brought to the fore the idea that ownership of, or perhaps more accurately responsibility for, the revolutionary settlement had passed to a new generation. Recurrent within the Addresses of the later 1810s was the notion of an inherited responsibility to maintain the revolution.⁴³⁷ Themes of inheritance and filial connection to the Revolution were not new,⁴³⁸ but in the period after the war they coalesced around ideas of preservation and transmission. Emphasizing the duty of the second generation to pass the Revolution's spoils onto succeeding generations, preservation came to be depicted as an

⁴³⁵ "...that what their fathers nobly won, they as nobly defended." Barker, *An Oration*, 7.

⁴³⁶ "War was declared... its event will form a proud era in our national history, whilst it adds a new prop to our Independence." Ammi Harrison, *Oration, Delivered before the Harmony Society, in New-Haven, on the Forty-First Anniversary of American Independence*, (New Haven, Conn.: Steel and Gray, 1817), 11.

⁴³⁷ "Americans, such was the past – such is the present. On you and advancing posterity, depends the responsibility of preserving the republick." Rollin C. Mallery, *An Oration, Addressed to an Assembly of United Citizens, at Whitehall, N. Y. July 4, 1817*, (Rutland, Vermont: Fay, Davison & Burt, 1817), 12. "...we are resolved to live free or die, to transmit to our posterity the liberty acquired by our ancestors..." MacLeod, *An Oration*, 17. My emphasis. "...how well we could protect the Independence our fathers had made her [Britain] acknowledge." Lance, *An Oration*, 11. "Would it be vain-glory to maintain that as we inherit the name, so we have neither forgotten the precepts, nor tarnished the laurels of our fathers?." Henry Laurens Pinckney, *An Oration, Delivered in St. Michael's Church, Before an Assemblage of the Inhabitants of Charleston, South-Carolina: On the Fourth of July, 1818. In Commemoration of American Independence; By Appointment of the '76 Association*, (Charleston, SC: W. P. Young, 1818), 3.

⁴³⁸ Noah Webster was utilizing the theme of inherited responsibility by 1798: "...and they bequeath to us a rich inheritance of liberty and empire, which we have no right to surrender..." Webster, *An Oration... 1798*, 16. On the importance of filial metaphors in early American attitudes their past see Lowenthal, *The Past is a Foreign Country*, 105-7. On the idea that notions of paternal relations were key to the republican ethos of the period see Peter S. Onuf & Leonard J. Sadosky, *Jeffersonian America*, (Malden, Mass.: Blackwell Publishers, Inc., 2002), 85-101.

act of supreme virtue itself.⁴³⁹ The revolutionary settlement and its maintenance was transformed from an obligation into an opportunity, with the second generation the heroic actors that would undertake it.⁴⁴⁰

Key to this paradigm was the idea that the revolutionary moment in which liberty defeated tyranny was only one aspect of the Revolution's claim to world-historic status. The transmission of a particular moment made little sense, and so weight was given to the view that America's political and social institutions were part of the Revolution's lasting significance. Central to this was the Constitution. Often overlooked or deemed worthy of only passing mention in earlier Addresses, it was now lavishly praised as America's gift to the world:

“When the States of North America formed the present constitution, they created, *what the world never before saw*, the social compact. ...The supposed perfection of government... is happily attained in our political constitution.”⁴⁴¹

It was “a stupendous monument of man's last, and greatest efforts for the preservation of liberty”⁴⁴² “which has never had a superior, and which now challenges the world to produce its equal.”⁴⁴³ Moreover, the Constitution was the most tangible inheritance of the second generation

⁴³⁹ “To make it [the Revolution] truly dear to his [the patriot of the second generation] heart and lovely to his fancy, he must unceasing imitate, ***for it is not possible to transcend, its excellence***. He must, at once, strive to follow the good and great example of his Forefathers, and to deserve, at some distant day, the appellation of an equal, by protecting their *household relics*.” Alexander Anderson, *Oration, Delivered at the Request of the Citizens of Washington, on the Forty-Second Anniversary of American Independence, in the Representatives Chamber, in the City of Washington*, (Washington: Jacob Gideon, 1818), 4. Bold emphasis mine, other emphasis original.

⁴⁴⁰ “A solemn obligation is imposed upon us, to preserve them [the principles of free government] inviolate, and to deliver them unimpaired, in vigor and purity to our posterity.” Dr. Samuel Jackson, *An Oration, Delivered at the County Court-House, Philadelphia, on the Forty-Second Anniversary of American Independence*, (Philadelphia: The Office of “The Democratic Press”, 1818), 10. “The treasures they have given us, we will give to our children.” Paul Willard, *An Oration, Pronounced at Charlestown, on the 4th July, 1821, at the Request of the Republican Citizens of that town, in Commemoration of the Anniversary of National Independence*, (Boston: E. Bellamy, 1821), 14.

⁴⁴¹ Andrew Dunlap, *An Oration, Delivered at Salem, on Monday, July 5, 1819, at the Request of the Association of the Essex Reading Room, in Celebration of American Independence*, (Salem, Mass.: Warwick Palfray, 1819), 9.

⁴⁴² Parker, *An Oration*, 6.

⁴⁴³ Harrison, *Oration, Delivered...in New-Haven*, 8.

from the founders, and as such was the barometer by which successful transmission was judged. As “their monuments are our political institutions”⁴⁴⁴ and “[o]ur inimitable constitution, the magna charta of our liberties, displays... the wisdom of our fathers”,⁴⁴⁵ it was through venerating and maintaining the (founders’) Constitution that the second generation could enact their heroic preservation.

The link between the Constitution and the founders was strongly emphasized within this paradigm. Francis Gray would state in 1818, that “[t]he federal constitution, whose establishment was most difficult, and its success the most doubted, derives from our veneration for its founders... an authority over public opinion.”⁴⁴⁶ Association of the document with a distinct group or generation enabled its continuance to be understood in terms of filial loyalty, leading orators such as Alexander Anderson to implicitly reiterate division of ownership and operation along generational lines: “Whenever we adopt *your* constitution to justify *our* authority...”⁴⁴⁷ Loyalty to the Constitution as it existed became the measure of loyalty to the principles of the Revolution. Such was the currency of constitutional fidelity, that at the state level Charles Loring could praise the Massachusetts electorate in *foregoing* the opportunity of engaging in constitutional politics and “clinging with fond veneration to the institutions of their fathers” in their rejection of constitutional amendments drawn up by the 1820 convention.⁴⁴⁸

⁴⁴⁴ Samuel Adams Wells, *An Oration, Pronounced July 5, 1819, at the Request of the Republicans of the Town of Boston, in Commemoration of the Anniversary of American Independence*, (Boston: T. Badger, 1819), 25.

⁴⁴⁵ Rodney S. Church, *An Oration, on the Forty-Third Anniversary of American Independence, Delivered at Clermont, Monday, July 5th, 1819*, (Hudson, New York: Samuel W. Clark, 1819), 10.

⁴⁴⁶ Francis C. Gray, *An Oration, Pronounced July 4, 1818, at the Request of the Inhabitants of the Town of Boston, in Commemoration of the Anniversary of American Independence*, (Boston: Charles Callender, 1818), 19.

⁴⁴⁷ Anderson, *Oration*, 15.

⁴⁴⁸ Charles G. Loring, *An Oration, Pronounced on the Fourth of July, 1821, at the Request of the Inhabitants of the Town of Boston, in Commemoration of the Anniversary of National Independence*, (Boston: Charles Callender, 1821), 10-11.

Heroic preservation as a method of negotiating the second generation's position vis-à-vis the first had much to offer but it also contained an inherent tension. Preservation allowed Americans to carve out a specific role for themselves, distinct from that of creation and so unthreatening to the founding that had already taken place.⁴⁴⁹ As such these two roles, creation and preservation, could be depicted as co-operative, with both generations sharing in the glory of institutional stability:

“This day should not pass with a tribute of veneration and gratitude to the illustrious men who achieved our Independence, *and of honor to those who have since so nobly maintained our national reputation.*”⁴⁵⁰

If the duty of the second generation was

“less splendid, [it was] not less important. To us belongs the task to preserve and to defend, to enlarge and to improve, the glorious inheritance we have received.”⁴⁵¹

However, as these quotes illustrate the very strength of the preservation strategy was also a weakness insofar as a focus upon preserving inherited institutions worked to entrench the idea that their creation was a glorious act. As the maintenance became a focus, it brought to the fore the second generation's central complex by requiring the active veneration for and so glorification of the first generation's achievements. It forced upon the second generation a posture of emulating the Revolution by venerating it:

“...for it is our pride, to dwell on the virtues and glories of our ancestors, to emulate them in our actions, and to transmit to posterity the accumulated and incorruptible inheritance of freedom.”⁴⁵²

In so much as it required this, preservation was a double-edged sword, working to institutionalize the very problem that it was aimed at addressing.

⁴⁴⁹ On the centrality of preservation and this problem more generally cf. Forgie, *Patricide in the House Divided*.

⁴⁵⁰ Loring, *An Oration*, 5. My emphasis.

⁴⁵¹ William Plumer, Jr., *An Address Delivered at Portsmouth, N. H. on the Fourth of July, 1828*, (Portsmouth, NH: T. H. Miller and C. W. Brewster, 1828), 22.

⁴⁵² Dunlap, *An Oration*, 8.

This tension was apparent in the speeches given by those attempting to execute the strategy of preservation. Henry Smith, addressing the people of Dorchester in 1822, found the tension almost impossible to navigate. Criticizing the tendency to be cowed by the legacy of the founders, he nonetheless almost immediately conceded his own generation's role was subservient to that of the former:

“But because they have done much for us, it is no reason that we should do nothing for ourselves, and because we reverence their memory, we should not therefore cling with more fondness to the errors which they have left us to correct, than to the liberal institutions which they have transmitted to us. And, although *we cannot expect to equal them in our exertions for the cause of freedom, we may yet avail ourselves of the light of experience to perfect their work according to the original spirit in which it was formed.*”⁴⁵³

Others who worked to frame preservation as an active expansion of the benefits of America's institutions – “Perish the parsimonious, the degrading prejudice, which would prompt you to sit down at the delicious banquet spread by freedom, in selfish enjoyment or in bigoted exclusion” – nonetheless quickly fell into justifying such depictions in terms of filial trust; “[The] American who would seek to exclude his fellow man... it is not uncharitable to declare, would prove himself a traitor to the spotless memory of his fathers.”⁴⁵⁴ Indeed, justifying the preservation of institutions often boiled down to a commitment not to raise “parricidal hands” against “the institutions [the Revolution] has given us.”⁴⁵⁵ Some showed sufficient self-awareness to see that preservation was itself rooted in the inescapable shadow of the founders; It was, after all, “in light of their illustrious deeds, [that we] feel a glowing zeal to show ourselves worthy of such

⁴⁵³ Henry B. Smith, *An Oration, Delivered at Dorchester, on the Fourth of July, 1822*, (Boston: The Office of the American Statesman, 1822), 10.

⁴⁵⁴ James R. Shays, *An Oration Delivered at Paterson, New-Jersey, on the Fourth of July, 1825*, (Newark, NJ: D. A. Cameron and Co., 1826), 9.

⁴⁵⁵ Russell Jarvis, *An Oration, Delivered Before the Republicans of Boston, on the Fourth of July, 1823*, (Boston: True and Greene, 1823), 17.

sires.”⁴⁵⁶ It was the melancholy truth for this generation, that “[t]he remembrance we so ardently desire, we render unto others.”⁴⁵⁷

In was within this conceptual cul-de-sac that the introduction of conceptions akin to heritage took place. With emulation, in the form of the War of 1812, and preservation of institutions proving conceptually weak approaches to the humiliating disparity between first and second generation achievement, heritage provided mitigation. Dislocating the passage of time between the founding and the contemporary period enabled the origin of the revolutionary institutions to positioned in an “exceptional” time that bore little comparison to the immediate era. This reduced the impact of the second generation’s inability to rival their forefathers. Crucially though, heritage also enabled the posture of preservation to remain coherent by enabling an identity between the past and the present, such that maintaining institutions did not need contemporary, in addition to its original, rationalization. By drawing the founding temporally closer – rendering it always imminent - and simultaneously pushing it farther back into history, the second generation could more credibly maintain the fiction that preservation was a heroic endeavor.

In the Addresses of the 1820s and early 1830s this dual approach to temporally locating the Revolution can be seen in attempts to complicate understandings of the passage of time. The Revolution had long been framed as the initiation of a new period in human history, but its temporal location had always been very much intertwined with human history.⁴⁵⁸ In 1826,

⁴⁵⁶ Ralph Randolph Gurley, *A Discourse, Delivered on the Fourth of July, 1825, in the City of Washington*, (Washington: Gales & Seaton, 1825), 6.

⁴⁵⁷ Charles Sprague, *An Oration, Delivered on Monday, Fourth of July, 1825, in Commemoration of American Independence, Before the Supreme Executive of the Commonwealth, and the City Council and Inhabitants of the City of Boston*, (Boston: True and Green, 1825), 5.

⁴⁵⁸ For example, David Ramsay’s assertion that “[w]hen General Washington is the subject, history and eulogy are the same – the speaker praises him best, who gives the most faithful narrative of his actions.”

George Bancroft, an individual who would emerge as a key historian of the Revolution for the second generation, instead posited that the Revolution had altered not just human history, but also time itself;

“The stream of time, which flowed through so many of the past centuries with a lazy current, has at last rushed onwards with overwhelming fury, leaping down one precipice after another, destroying all barriers in its ungovernable swiftness.”⁴⁵⁹

This change meant a period of fifty years in which events had exponentially increased. “No so short period of history ever presented so many or mighty revolutions, ...grand displays of national force; armies so numerous, ...battles so...decisive.”⁴⁶⁰ Time itself had become denser, and as a result the fifty years following the Revolution represented a greater passage time than the calendar suggested. Concurring in this assessment of those fifty years, William Hunter would declare in the same year that recounting the period would require “the compressing energy of Tacitus or Montesquieu” – for those of “ordinary abilities” it would be a “hopeless and endless labour.”⁴⁶¹ Others, too, would note the density of this apparently short period. In 1833, Edward Prescott would declare that “[s]hort as are the records of our Country, every page is filled with events involving the momentous consequences... exerting a sway over the different Governments of the world, at once unanticipated and irresistible.”⁴⁶²

David Ramsay, *An Oration on the death of Lieutenant-General George Washington, late President of the United States, who died Dec. 14, 1799. Delivered in St. Michael's Church, January 15, 1800, at the request of the Inhabitants of Charleston, South Carolina; and published by their desire*, (Charleston: W. P. Young, 1800), 10.

⁴⁵⁹ George Bancroft, *An Oration Delivered on the Fourth of July, 1826, at Northampton, Mass.*, (Northampton, Mass.: T. Watson Shepard, 1826), 11.

⁴⁶⁰ Bancroft, *An Oration*, 11.

⁴⁶¹ William Hunter, *Oration Pronounced Before the Citizens of Providence, on the Fourth of July, 1826, Being the Fiftieth Anniversary of American Independence*, (Providence: Smith & Parmenter, 1826), 43.

⁴⁶² Edward G. Prescott, *An Oration: Delivered Before the Citizens of Boston, on the Fifty Eighth Anniversary of American Independence*, (Boston: John H. Eastburn, 1833), 3.

Alongside the attention to the density of the time between the contemporary period and the Revolution, and working to the same effect, sat an effort to emphasize the difference between the past and present. Drawing distinction between the Founding and the current period, speakers encouraged a view of what was essentially recent history as pertaining more strongly to the past rather than the present. The past fifty or so years had “rolled into the shoreless ocean of eternity” and separated the concerns of the past from those of present.⁴⁶³ Emphasizing temporal distance, James Austin would dismiss the early party squabbles as being as little cared of in contemporary life as “the prosecutions of the Quakers or the persecution of the witches in the early history of New England”, before suggesting the former were as alien as the disputes of the fictional inhabitants of Lilliput.⁴⁶⁴ Charles Cutter would be more explicit, if less lyrical, in drawing a distinction between the “by-gone times” that they celebrated on the Fourth – a period before even the “palmy days of Federalism” - and “modern times.”⁴⁶⁵ As Cutter’s use of the adjective “palmy” suggests, notions of a golden age⁴⁶⁶ operated to separate past from present. The Revolution had existed in “a purer age,”⁴⁶⁷ and in narration was subject to a consensus that contrasted with the “debatable ground” of the current day.⁴⁶⁸ Pushed into the past, the Revolution became not merely legend, as it had become as soon as the feats of Washington were told in

⁴⁶³ William Morse, *An Oration, Delivered Before the Citizens of Nantucket, July 4, 1829, Being the Fifty-Third Anniversary of the Declaration of the Independence of the United States of America*, (Boston: Putnam, & Hunt, 1829), 16.

⁴⁶⁴ James T. Austin, *An Oration, Delivered on the Fourth of July, 1829, at the Celebration of American Independence in the City of Boston*, (Boston: John H. Eastburn, 1829), 14.

⁴⁶⁵ Charles W. Cutter, *An Oration Pronounced Before the Whigs of Portsmouth, on the Fourth of July, A. D. 1834*, (Portsmouth, NH: James F. Shores, 1834), 7, 23, 21.

⁴⁶⁶ For a discussion of the role of the idea of a “Golden Age” in American politics see Andrew R. Murphy, “Longing, Nostalgia, and Golden Age Politics: The American Jeremiad and the Power of the Past”, *Perspectives on Politics* 7 (March 2008).

⁴⁶⁷ N. G. Pendleton, *Oration, Delivered on the Fourth of July, 1831, Before the Citizens of Cincinnati, in the Methodist Church, on Sixth Street*, (Cincinnati: Lodge and L’Hommedieu, 1831), 5.

⁴⁶⁸ Hunter, *Oration*, 45.

fantastical terms, but an event associated with mythical period, set conceptually outside of historicized time.

However, as much as speakers worked to separate past and present, they also sought to forge continuity between them. With the Revolution a mythical moment, the closeness to and continuity of the Revolution to the present was also simultaneously emphasized. On one hand, the origins of the Revolution were pushed further back in time, ensuring that the colonial, revolutionary, and republican periods were seen as continuous and organically linked to each other. Convers Francis would stress that it was “principles which have been so long wrought into the character of community”, not particular great men of the Revolution that lead to Liberty’s victory.⁴⁶⁹ Even as he dismissed the Lilliputian disputes of the early Republic, Austin would push back the birth of liberty from the Revolution and to colonial Massachusetts.⁴⁷⁰ On the other hand, that very continuity and historical placement was deployed to indicate the freshness and relevance of the past. The link between the colonies, the Revolution, and the present showed the continuity of sentiment that made the past comprehensible to the present.⁴⁷¹ The Revolution was “but the prelude of the swelling scenes” which were to come.⁴⁷² Additionally, the ability to

⁴⁶⁹ Convers Francis, *An Address Delivered on the Fourth of July, 1828, at Watertown, in Commemoration of the Anniversary of National Independence*, (Cambridge: Hilliard and Brown, 1828), 12. Such a view fit well with Francis’s philosophy of history. “So it is with the events of history. They form a continuous series, sometimes with strong bonds of connexion, sometimes with slender and scarcely visible ties; and he, who traverses back their course may find himself inclined to stop before he reaches [them]. We should err greatly, were we to suppose that the act, which at last separated the colonies from the mother country, arose merely out of the excitement of the time when it happened” (4).

⁴⁷⁰ “But the declaration of national independence... is not to be considered as the commencement of American liberty. More justice is due to the earlier settlers of Massachusetts...” Austin, *An Oration*, 3.

⁴⁷¹ Reserving the idea of inherited characteristics, William Allen would make the colonists “[w]orthy indeed to be the sires of the Adams’s, Otis’s and Quincy’s.” Then skipping a generation, and so emphasizing the stability of sentiment, he made the fathers of the revolutionaries the inspiration for those tasked with preserving the Revolution. William S. Allen, *An Oration, Delivered in Newburyport, on the Fifty-Fourth Anniversary of the Declaration of American Independence*, (Newburyport, Mass.: The Herald Office, 1830), 6.

⁴⁷² Plumer, *An Address*, 21.

intelligently narrate the origins and course of the Revolution were used to place it within the scope of contemporary comprehension. There was not need for the celebration of American origins to rest on fable, declared a New Orleans speaker, for its birth could be intelligently known.⁴⁷³ Through learning of the patriots' deeds, Americans kept the founders immediate - "fresh and living from generation to generation."⁴⁷⁴ In a particularly ambitious synthesis of these trends, Charles Cutter, while advocating the distinction between the 1830s and the 1790s (see above), would suggest that it was America's fortune to be able to effectively and explicitly trace her origins – to the Anglo-Saxons of Roman-Era German Forests!⁴⁷⁵ Cutter's belief that the events of fifty years past were "by-gone" while the events of eighteen hundred years ago were eminently knowable, brings into sharp relief the distortion of time that was taking place. Immediacy was sat alongside obscurity, and alternated without apparent contradiction. Heritage, deployed in this way, simultaneously acknowledged the passage of time between the contemporary moment and the Founding and displaced it.⁴⁷⁶

Contorting the passage of time like this enabled the second generation to partially undermine the hold the Founding placed upon them. Heroic preservation did not suffer in comparison to creation, as the latter belonged to a different, distant "non-time." But the creation was also made immediately available as a didactic tool and a claimed legacy. Heritage meant

⁴⁷³ O. P. Jackson, *An Oration, Delivered by O. P. Jackson, Esq. on the Fourth of July, 1835, By the Request of the Young Men's Committee of Arrangements*, (New Orleans: Hotchkiss & Co., 1835), 5-6.

⁴⁷⁴ Jackson, *An Oration*, 4.

⁴⁷⁵ Cutter, *An Oration*, 12.

⁴⁷⁶ It is of interest that the paratext of these addresses seems also to have been deployed to this end. Inserting the year of commemoration (e.g. fifty-first, forty-eighth) into the Addresses' titles worked to quantify their temporal distance from the Revolution and drew attention to both the connection between the events and the measureable gap between them. Interestingly, such a reflex is also observable in the mid-1810s, the previous occasion in which parallels between current events and the Revolution were desired, but in which the concept of distance also significant. On a discussion of Genette's concept of paratext see Leslie Howsam, "What is the Historiography of Books? Recent Studies in Authorship, Publishing and Reading in Modern Britain and North America," *The Historical Journal* 51, (2008): 1091.

making immediate the spirit of the Revolution, but making distant its events. The founders could be worthy of their “lofty merit,” their government - “a perpetual monument of their wisdom” - would endure, and they had fulfilled their destiny. But such achievement did not reflect upon the present generation, as theirs was another destiny marked out for the new era, in which “those liberal precepts... dimly seen, and known to our fathers only in theory” could be carried more fully into practice.⁴⁷⁷ This new age faced new challenges that the patriots had lacked the knowledge or willingness to address. Allied with heritage, preservation meant filial fidelity through adaptation – it demanded the application of the Revolution to a new world. The new age, separated from the founding by an increase in political knowledge rendered the present generation not subservient to the past, but willingly and consciously honoring it through meeting new challenges.

As with the earlier iteration of preservation, the Constitution operated as a potent symbol of both the new challenges and filial fidelity. The Constitution was seen as the guarantor of liberty, but the mechanism by which it was to achieve this in the era of new challenges became a fault-line. While some sought to challenge the notion that the Constitution was “too sacred to be tampered with”⁴⁷⁸ by framing it as “a bridle in the mouth of people,”⁴⁷⁹ by and large it was the former view that dominated. But that consensus in itself did little to resolve political conflict – instead the Constitution was deemed to be at stake in almost every oration. Defense of the Constitution became a crucial gauge of “correct” political action, and individuals and policies were fashioned as legitimate or flawed insofar as they accorded with the document. The Constitution was mobilized in identifying partisan heroes; a Jackson - Washington’s equal in

⁴⁷⁷ David Henshaw, *An Address, Delivered Before an Assembly of Citizens From all parts of the Commonwealth, at Faneuil Hall....Boston. July 4, 1836*, (Boston: Beals and Greene, 1836), 4-5.

⁴⁷⁸ Wilder, *An Oration*, 21.

⁴⁷⁹ Bancroft, “An Oration”, 8.

being “benefactors of the human race” - whose administration would be “*the* brightest page of American history”,⁴⁸⁰ and a Webster, “the noble champion of our Constitution.”⁴⁸¹ And partisan villains – Jackson again,⁴⁸² the North,⁴⁸³ and anti-slavery agitation.⁴⁸⁴ Partisan squabbles came to be cast in constitutional terms. President Jackson was either praised for keeping the national government “within the prescribed limits of the Constitution”⁴⁸⁵ or condemned for construing “the Constitution as he pretends to understand it.”⁴⁸⁶ William Henry Harrison would argue that secession was never within the intent of the Federal Convention,⁴⁸⁷ South Carolina’s Henry Pinckney would counter that the Convention intended a compact of states.⁴⁸⁸ Perhaps nothing more exemplifies period’s contention that the Constitution is above politics while thrusting it into all partisan debates than Jackson’s Farewell Address in which every issue is a constitutional one – and Jackson is on the correct side of each.⁴⁸⁹ In the vivid words of one 1834 critic of this tendency, “The Constitution has been obliged to leave its temple, and come down into the forum, and traverse the streets.”⁴⁹⁰ Throughout these conflicts, the second generation sought to rearticulate the intent of the Constitution and apply it to the contemporary problems they faced. Emerging from the second generation’s use of heritage in order to relate satisfactorily to their

⁴⁸⁰ Henshaw, *An Address*, 35. My emphasis.

⁴⁸¹ Allen, *An Oration, Delivered in Newburyport*, 12.

⁴⁸² Cutter, *An Oration*.

⁴⁸³ Henry, L. Pinckney, *An Oration, Delivered in the Independent, or Congregational Church, Charleston, Before the State Rights & Free Trade Party, The State Society of Cincinnati, The Revolution Society, The '76 Association and the State Volunteers, on the 4th of July, 1833, Being the 57th Anniversary of American Independence*, (Charleston, SC: A. E. Miller, 1833).

⁴⁸⁴ Joseph R. Williams, *An Oration Delivered Before the Citizens of the Town of New-Bedford, on the Fourth of July, 1835*, (New-Bedford: J. G. W. Pope, 1835); William Henry Harrison, *Address by General Harrison, Delivered on the Fourth of July, 1833, at Cheviot, Greene Township, Hamilton County, Ohio*, (Cincinnati: Reynolds, Allen & Disney, 1833).

⁴⁸⁵ Henshaw, *An Address*, 35.

⁴⁸⁶ Cutter, *An Oration*, 28.

⁴⁸⁷ Harrison, *Address*, 16-17.

⁴⁸⁸ Pinckney, *An Oration*, 16.

⁴⁸⁹ Andrew Jackson, “Farewell Address, March 4, 1837.” Accessed May 2, 2011.

<http://millercenter.org/scripps/archive/speeches/detail/3644>.

⁴⁹⁰ “ART. III – Story’s Constitutional Law,” 66.

revolutionary legacy, the Constitution became a symbol of the founders as well as a lodestone of political debate.

As a strategy, heritage therefore enabled the second generation to negotiate their place within the narrative of American development, but also heightened the rhetorical value of constitutional veneration. Freed from direct comparison to the glories of the Revolution, the second generation could nevertheless claim a share in its afterglow through preservation. They could claim to “[h]onor... the memory of the men from whom we inherit the rich bequest of civil liberty,”⁴⁹¹ but see themselves engaged in more than continuing that bequest. They were reminded that they, like their fathers, had “public duties to perform”, for the “times do not indeed ask of us those sacrifices of fortune and life... but they do require every man... to exert his talents and his influence.”⁴⁹² Their preservation became not an act of filial fidelity, but an act valuable of itself. Their duty was not to preserve what their inheritance because it was bequeathed them, but also because it was an objectively worthy act – and by extension their inheritance was also a worthy one. Their allegiance was to the institutions, and the values that underpinned them, rather than to their fathers;

“The trial of adversity was theirs; the trial of prosperity is ours... If we fail: if we fail; - not only do we defraud our children of the inheritance which we received from our fathers, but we blast the hopes of friends of liberty throughout our continent... throughout the world, *to the end of time*.”⁴⁹³

⁴⁹¹ George Bancroft, *An Oration Delivered Before the Democracy of Springfield and Neighboring Towns, July 4, 1836*, (Springfield: George and Charles Merriam, 1836), 3.

⁴⁹² Plumer, *An Address*, 15, 16.

⁴⁹³ Edward Everett, “Oration Delivered before the Citizens of Charlestown, on the 4th July, 1828”, in Edward Everett, *Orations and Speeches, on Various Occasions*, (Boston: American Stationers’ Company, 1836), 161. My emphasis.

“We rejoice in free institutions, and in our favored condition; it is our duty to elevate our character as a people, to a level with these institutions and this condition. *We must make ourselves worthy of them.*”⁴⁹⁴

Revolutionary history thus became a didactic instrument, and the legacy not framed primarily in terms of an obligation; “The duty, then, of vigilance and devotion to public service is first among the great moral lessons, applicable to the present times, which are taught us by the history of the revolution.”⁴⁹⁵ The Revolution provided inspiration for the challenges of the day, not a binding hold on the second generation’s response to them. Nevertheless, the challenges that the second generation would address were once more framed around ideas of preserving of the Constitution, which became the theatre of rhetorical conflict. And as will be shown below, the mythology of the Constitution under “heritage” was marked in comparison to its earlier symbolism.

The Constitution and Fourth of July Toasts

Occupying a central position within American’s historical self-narrative, the Constitution became a totem of loyalty to the founders and a mechanism for marshaling their support for any given political project. Alongside its rhetorical position within Fourth of July orations, the rise of the Constitution as a symbol can be seen in its invocation in Fourth of July toasts. By utilizing the Readex electronic database of Early American newspapers I created a sample of toasts for the years 1810-1835.⁴⁹⁶ A simple search for the term “toasts” was used for the seven days following the Fourth (5th-11th of July) of the each year⁴⁹⁷ and then each successful return examined and

⁴⁹⁴ James Humphrey Wilder, *An Oration Delivered at the Request of the Young Men of Hingham, on the Fourth of July, 1832*, (Hingham: Jedidaah Farmer, 1832), 8.

⁴⁹⁵ Plumer, *An Oration*, 16.

⁴⁹⁶ Readex: America’s Historical Newspapers. Accessed 27th March 2011 to 6th March 2012.

⁴⁹⁷ Low levels of successful returns meant the expansion of the date range for 9 days after 1831.

logged if it was a report of a series of at least six Fourth of July toasts.⁴⁹⁸ Recording each individual toast within a given series, the proportion that contained a toast to the federal Constitution could be calculated. The results are shown on the chart (figure 1) alongside a three-year rolling average of the proportions. As the chart shows, the proportion of 4th of July toasts to the Constitution was approximately a third from 1810 until the 1820s. However, moving into 1830s that proportion substantially increased – reflecting the Constitution’s role as a symbol of the second generation’s witnessing of the founding.

⁴⁹⁸ Reports of less than six toasts, those that amalgamated several distinct locations, and those that appeared to be satire or which did not seem to have been publicly offered, were rejected.

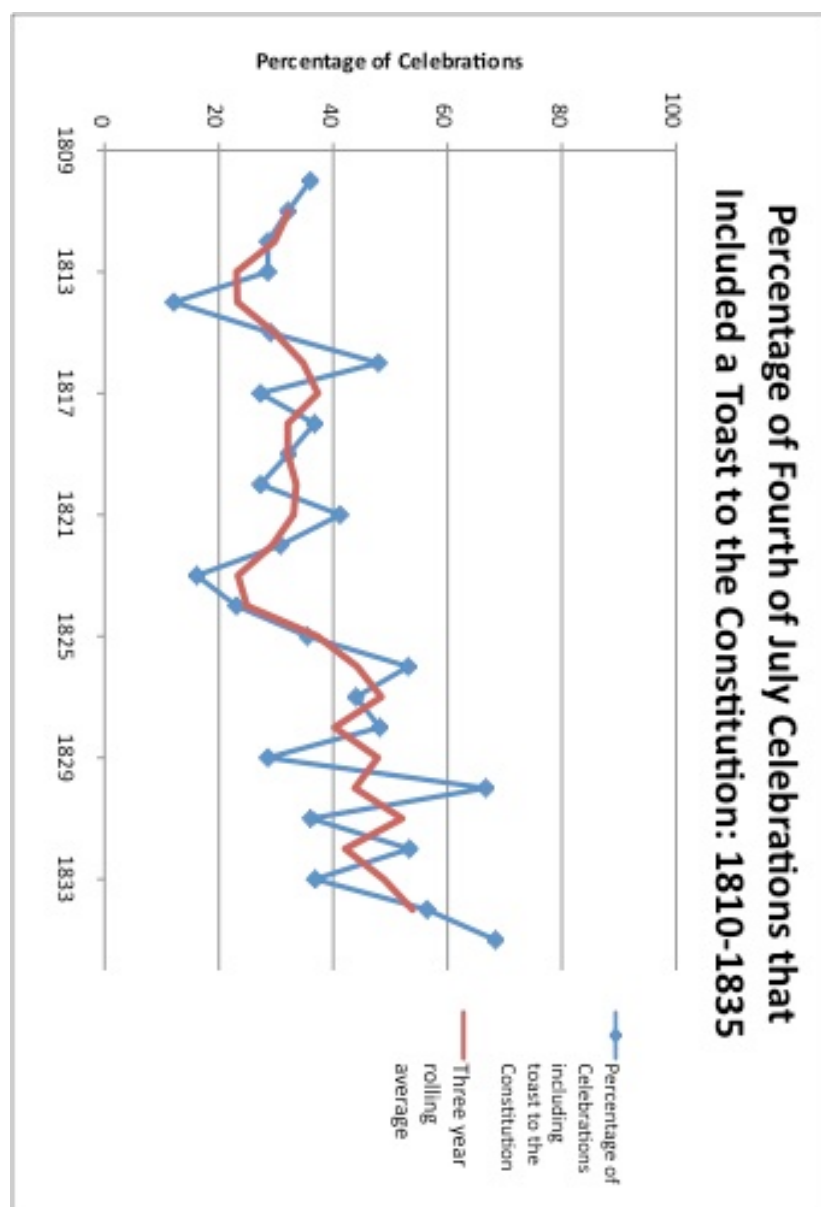


Figure 1. Percentage of Fourth of July Celebrations that Included a Toast to the Constitution: 1810-1835

At the same time, the nature of the Constitution's invocation during Fourth of July toasts evinced a view of the document as sacred. While opposition to reform of the Constitution had been a theme within earlier toasts, by the 1830s alteration of the text became an almost existential threat - alteration would violate the myth that the document was one of timeless wisdom. To be sure, in 1815 fear of innovation (as distinct from violation or destruction) was seen in the toast:

*"Our Constitution - The noblest model of a free government, which human wisdom has ever produced. Let those who venerate its principles guard it from innovation,"*⁴⁹⁹

but over the subsequent decades it became a significant theme. In the toasts of 1830 fear of innovation was linked to the duration of the founders' Constitution;

*"The Constitution - may no rust corrupt it, and no tinkers mend it."*⁵⁰⁰

*"The Constitution - The Legacy of our fathers' love: let our filial reverence guard it from rash innovation."*⁵⁰¹

In addition, concern over loyal interpretation could also be seen:

*"The Constitution of the United States, our political Chart. May it never be frittered away by the adoption of constructive powers not clearly defined by its letter and its spirit."*⁵⁰²

*"The Constitution of the United States - A noble text vilely misinterpreted."*⁵⁰³

Such ideas would be repeated in 1835. In two distinct toasts Chesterfield, revelers acknowledged the origin of the document and linked this to fear of violation;

*"The Constitution of the United States; The work of wise heads and pure hearts; may each attempt at its violation hallow and endear it to the affections of Americans."*⁵⁰⁴

⁴⁹⁹ *Columbia Patriot*, July 5, 1815.

⁵⁰⁰ *Ithaca Journal and General Advertiser*, July 7, 1830.

⁵⁰¹ *Richmond Enquirer*, July 9, 1830.

⁵⁰² *The Farmers' Cabinet*, July 10, 1830.

⁵⁰³ *Charleston Courier*, July 14, 1828. Original emphasis.

⁵⁰⁴ *Richmond Enquirer*, July 14, 1835. Original emphasis.

*“The Constitution of the United States: Purchased with blood, perfected with wisdom - may it never be sold for money, or lost through folly.”*⁵⁰⁵

The claim that the Constitution was “purchased by blood” reflected the location of the Constitution with the mythological time of the Revolution – positing the former as a direct consequence of the latter. Other celebrations shared the similar fear of constitutional “tinkering.” In Lynn, MA,

“The Constitution of the United States. Palsied be the arm, and short and wretched the life of the man, who shall dare approach this sacred ark of our liberties with sacrilegious and ruffian hands.”⁵⁰⁶

In Richmond, MA,

*“The Constitution of the United States - May its "figure head" never be molested.”*⁵⁰⁷

And in Meredith Bridge, NH, the succinct view that

“The Constitution. "It must be preserved".”⁵⁰⁸

In such a way, the imperative of constitutional preservation, free from innovation and loyal to the creation of the founding fathers - the culmination of the views put forth in the orations discussed above – became reflected in the accompanying toasts.

The increasing invocation of the Constitution within the toasts, sat alongside a growing conception of Constitution as of significance due to its claim to be the work of the founders themselves. Extracting from all the toasts to the Constitution those that contain an allusion to the origins of the document creates the distribution shown in table 1. This table shows a breakdown by decade of the origins of the Constitution, as expressed in these toasts. Indicating a steady

⁵⁰⁵ *Richmond Enquirer*, July 14, 1835. Original emphasis.

⁵⁰⁶ *Salem Gazette*, July 7, 1835.

⁵⁰⁷ *The Pittsfield Sun*, July 16, 1835. Original emphasis.

⁵⁰⁸ *New Hampshire Patriot and State Gazette*, July 20, 1835.

increase in particularized attributions (those which located the origins of the Constitution in an historical individual or group). While in the 1810s attribution was predominantly to abstracted notions of “wisdom” or the slightly less abstract “national wisdom,” by the 1820s the dominance of “wisdom” was being challenged by notions of “architects” and “framers.” With the 1830s wisdom has become rooted in particular figures – “wise men” – and the categories of “framer,” “father,” and “ancestor” sit alongside abstract notions of “American skill” and “genius” instead of the earlier values of “virtue,” “patriotism,” and “valor.” These toasts attest to the closer association of the Constitution with the particularized figures of the founders that reflects the understanding of the document described in the orations.

Table 1: Constitutional Attributions in Fourth of July Toasts by Decade. (Particularized attributions in bold and italicized).

1810s		1820s		1830s	
Non-human wisdom/experience	9	Wisdom	6	<i>Wise/wisest/best/great men/her</i>	4
Human/national invention/wisdom	7	<i>Architects/workmen</i>	3	<i>Framers</i>	3
<i>Framers</i>	2	Virtue	3	<i>Fathers</i>	3
<i>Patriots</i>	3	<i>Framers</i>	2	<i>Ancestors</i>	2
<i>Fathers</i>	2	Man/human	2	People	2
Liberty	1	Patriotism	2	States	2
<i>Wisdom of '76</i>	1	Learning	1	<i>Founders</i>	1
States	1	<i>Statesmen</i>	1	<i>Sages of Revolution</i>	1
<i>Genius of Hamilton</i>	1	Declaration of Independence	1	<i>Authors</i>	1
Union	1	Rational liberty	1	Genius	1
Will of the People	1	<i>Wisest and best of men</i>	1	<i>Workmen</i>	1
<i>Contracting parties</i>	1	<i>Fathers</i>	1	<i>Whigs of '76</i>	1
Skill	1	<i>Authors</i>	1	American skill	1
(Obscured)	1	States	1	Local sacrifice	1
total		<i>Illustrious projectors</i>	1		
	32	Wisdom of free representation	1		
		<i>Patriots</i>	1	total	24
		total	29		
Number of particularized attributions	10	Number of particularized attributions	11	Number of particularized attributions	17
Proportion of attributions (%)	31.25	Proportion of attributions (%)	37.93	Proportion of attributions (%)	70.83
Sample size 143		Sample size 118		Sample size 116	

The association also suggested a view that preservation ought to be understood in terms of maintaining the founders' intent, and within the toasts some evidence of this emerges. A 1833 celebration at Richmond, VA would express a commitment to that idea with the toast

“The Constitution of the U. States - interpreted not according to temporary policy or sectional views, but in the spirit and on the principles of its venerated founders.”⁵⁰⁹

While in Hartford, Connecticut opposition to Jackson was articulated as fidelity to the founders:

“The Constitution of the United States - As its framers understood it, and not as General Jackson understands it.”⁵¹⁰

and Lenox, Massachusetts hoped that interpretation would be grounded in an insight comparable to the Constitution's authors:

“The Constitution - the Charter of American Liberty - May those who interpret it, possess the wisdom and patriotism of its Authors.”⁵¹¹

In St. Albans, Vermont, revelers would identify the intent of the framers as expressed in the form of the *Federalist Papers* as worthy of celebration:

“The Authors of the Federalist. A triumvirate not to destroy the Republic, but to consolidate the union of its members. Their comment should be read with the text.”⁵¹²

and in Richmond again Madison would be praised, not as a President or the author of *Resolutions*, but as a framer,

“The venerable Madison - The ablest expounder of the Federal Constitution, and the best interpreter of his own work.”⁵¹³

As the Constitution was drawn closer to its framers in the historiography, it seemed inevitably drawn closer in the realm of interpretation as well.

⁵⁰⁹ *Richmond Enquirer*, July 9, 1833.

⁵¹⁰ *Connecticut Courant*, July 7, 1834.

⁵¹¹ *Berkshire Journal*, July 8, 1830.

⁵¹² *The Repertory*, July 8, 1830.

⁵¹³ *Richmond Enquirer*, July 9, 1833.

Just as the toasts reflected an understanding of the Constitution as worthy of and demanding preservation, so too did they indicate the increasing political value of an individual association with the document. The toasts to individuals suggest that political heroes of the late 1820s and 1830s were measured and assessed, at least in part, by their relationship to the Constitution. Henry Clay's claim to presidential candidacy was advanced by the Volunteers of Richmond via his relationship to the Constitution.

*"The Hon. Henry Clay; the able defender of the Constitution: May he be our next President."*⁵¹⁴

Elsewhere, John Quincy Adams's constitutional knowledge was praised;

*"John Quincy Adams - "He studied the Constitution that he might defend it; he examined its principles that he might maintain them"."*⁵¹⁵

Daniel Webster's value came of his interpretative abilities;

*"The Constitution of our Union: "And the king's wise men, and the magicians, and the soothsayers, were brought in; but they could not read the writings: Then Daniel was called, and he shewed the interpretation thereof: So this Daniel was preferred above the Presidents and princes; forasmuch as he was faithful, and because an excellent spirit was in him"."*⁵¹⁶

The Chief Justice was lauded for his preservation of the Constitution;

*"The Chief Justice of the United States - In expounding the Constitutional Law, he has "preserved" the Union."*⁵¹⁷

And the irrepressible President Jackson was framed as the Constitution's guardian;

*"Constructive Powers - The forbidden fruit, between which and the wily tempters, our Chief, as dauntless in the cabinet as in the field, has interposed a shield that will save our happy Constitution from eternal death."*⁵¹⁸

⁵¹⁴ *Richmond Enquirer*, July 10, 1835. Original emphasis.

⁵¹⁵ *Daily National Intelligencer*, July 9, 1830.

⁵¹⁶ *Salem Gazette*, July 9, 1830.

⁵¹⁷ *Daily National Intelligencer*, July 9, 1830.

⁵¹⁸ *Ithaca Journal and General Advertiser*, July 7, 1830. Original Emphasis.

Indeed, for some celebrants, it seemed wholly impossible that their chosen heroes could *not* have had an intimate relationship with the Constitution:

“Washington, the Saviour of his Country – *Jefferson, the framer of the Constitution*: May their names be never forgotten by the true Republicans.”⁵¹⁹

As with the toasts to the Constitution and the orations, the Constitution came to operate as a symbol by which an individual’s greatness – their unity with the founding fathers – could be symbolized.

The Fourth of July toasts reflected then the processes seen in the orations and the broader historiography urged by the founders themselves. The toasts track an increasing importance for the Constitution within the outpouring of early American nationalism that marked the annual Fourth of July celebrations. Becoming ever more central to American self-identification, the Constitution emerged as both a central symbol of national unity and an invocation with significant rhetorical currency. As the final toasts show, the Constitution emerged as an important association for aspiring national figures and for their policies. However, this importance was grounded in the development of the attitude of “heroic preservation” detailed above. The Constitution became more important because it came to be understood as a moment of republican founding and an intervention marked by exceptional virtue. The second generation sought to preserve the constitutional settlement as testament to their own republican virtue – and in doing so paid homage to the virtue of the founding generation. That the Constitution’s rising prominence within the toasts maps on to a closer association of the document with the founders is then not surprising. But that the association would ultimately be formed within the public realm of Fourth of July remembrance rather than private letters and histories of the actors of

⁵¹⁹ *Richmond Enquirer*, July 17, 1835. My emphasis.

1787-88 challenges claims that the Constitution's historiography represents an elite victory over the people's agency.

Conclusion

As quoted above, an 1834 observer of constitutional law noted that "The Constitution has been obliged to leave its temple, and come down into the forum, and traverse the streets."⁵²⁰ Reviewing Joseph Story's *Commentaries*, the writer hoped that the Justice's guidance would satisfy the public mind on questions of constitutional law and "put an end to the controversies, which agitate the country."⁵²¹ "Constitutional Law, in our day," the writer lamented, "instead of being the calm occupation of the schools, or the curious pursuit of the professional student, has become – as it were, – an element of real life."⁵²² As the toasts from the 1830s detailed above demonstrate, this writer was certainly correct in the view that by the time he wrote the deployment of the Constitution was a regular and central rhetorical device within partisan politics. However, this chapter has also demonstrated that a belief that there was a time when the realm of constitutional law was not "an element of real life" is misplaced. Throughout the early Republic Americans sought to make sense of their relationship with the Constitution through public enactments, social celebrations, and the invocation of collective memory. The role of the Constitution within American political life was never something determined in the seminars and courtrooms of the nation's legal elites. And as such it was never a wholly elite project – the

⁵²⁰ "ART. III – Story's Constitutional Law," 66.

⁵²¹ "ART. III – Story's Constitutional Law," 66. Interestingly, the writer saw written constitutions as innately the source of contestation. Story would, he hoped, be able to unfold "the purport of the letter through the unity and connexion of the spirit."

⁵²² "ART. III – Story's Constitutional Law," 65-66.

meaning of the Constitution, and crucially the reverence for it, was forged within the participatory realm of politics “out of doors.”

Belying the writer’s lament, the Constitution was not brought down from its temple as the second generation of Americans sought to make sense of their constitutional legacy. Instead, it was through the process of improvising a relationship with the constitutional founding that they inherited that the second generations of Americans installed both the Constitution and its authors within a temple. Deprived of the opportunity to partake in the creation of a polity by the existence of the Founding, they were required to direct their ambition in a different direction. Utilizing the technique or strategy of heritage to distort the passage of time between the foundation of the American republic and the contemporary period, they simultaneously pushed the Revolution further back in imaginable time and made it more immediate. This enabled the Revolution to be claimed by the second generation and deployed as a didactic tool, while at the same time framing it as a distinct period, separated from the challenges of early Antebellum America. As such the generation could, to paraphrase Joyce Appleby’s description, rework their cultural inheritance, respond selectively to it, and adapt techniques and prescriptions that met the exigencies of the living.⁵²³

In adopting this approach, they seized upon the Constitution as a means by which to justify the perceived greatness of the founders, but also a method of assessing their own stature. The Constitution both proved the founders’ greatness and established the greatness of the country they had founded. It also allowed the second generation to assert their own connection with the founding and to measure their fidelity to it. Re-conceiving the challenge of

⁵²³ Appleby’s actual description reads thus; “Each set of heirs necessarily reworks its cultural inheritance; its members respond selectively, adapting techniques and prescriptions to the exigencies of living, unthinkingly neglectful of some elements, willfully rejecting others, often atavistically spurning its parents’ beliefs to revive the tastes and interests of an earlier age.” Appleby, *Inheriting the Revolution*, 18.

constitutional preservation to be era-specific, the second generation accelerated the veneration of the constitutional document. In seeking to negotiate their own position vis-à-vis the greatness of the founders, the second generation actually responded by forging a second cult, that of the Constitution, into which the founders were incorporated.

However, in becoming the litmus test of political action and political actors, the Constitution came to operate simultaneously within the reified sphere of cultural self-identity and the more robust sphere of partisan politics. As the quote mentioned in this chapter's body vividly suggests, if the Constitution did indeed traverse the streets in 1830s, it was also the case that it came down from its temple to do so. As much as the Constitution would emerge as a political football, it would do so precisely because of its venerable association with the founders. To capture the Constitution was to capture their glory, and to frame one's own actions against the continuing glory of the country. In negotiating their revolutionary inheritance, the second generation also advanced a worship of the *founders'* Constitution.

Chapter 4: Founding Authority: John Marshall, Democratic Founding, and McCulloch v. Maryland

The Judiciary of the United States - The guardians of the Constitution and the palladium of individual rights⁵²⁴

John Marshall - One of the fathers of the Constitution, and its highest official expounder: a pure intellect without passions, except the love of country⁵²⁵

Alongside the originary authority of the Constitution's authors and the emerging social importance of the latter's relationship with the constitutional document, came the development of an institutional locus for the Constitution itself. This development, more so than the other two, was refracted through the institutions given shape by the Constitution itself. The Supreme Court's brethren, under the Chief Justiceship of John Marshall, came to be positioned as the "guardians of the Constitution" and in the process to stake out their own authority over the text itself. Shaping the manner in which the Constitution would be understood, Marshall and his colleagues became to an extent "fathers" of the Constitution alongside the authors of 1787, insofar as they relocated and advanced textual authority within the judicial apparatus.

The institutionalization of the Supreme Court's authority proceeded along two distinct trajectories: (1) the institutionalization of the judiciary; and (2) the appropriation of constitutional authority by the Court. Both trends supported the emergence of a Court able to articulate a claim to guardianship of the Constitution, although as President Andrew Jackson's apocryphal rejection of the Court's authority in *Worcester v. Georgia* (31 US 515) suggests, such a process was not complete by the 1830s. This chapter focuses on the latter development. As the body of law, corps of lawyers, and personnel of the Supreme Court grew in the early nineteenth-century,

⁵²⁴ Toast at 4th of July Celebration 1819, Boston, MA. *Columbian Centinel*, July 7th, 1819.

⁵²⁵ Toast at 4th of July Celebration 1831, Washington, DC. *Alexandria Gazette*, July 9th, 1831.

the federal judiciary developed the capacity to claim control over constitutional meaning.⁵²⁶ Alongside this capacity came an appropriation of constitutional authority. This chapter examines the ideological claims made by John Marshall (and to a lesser extent Justice Samuel Chase) in pursuit of this authority. Examining five cases closely, the chapter shows that in order to grant the Court textual authority, Marshall was forced to grapple with, and reconfigure, the claims of the people and the framers to constitutional authority. In doing so, he constructed an authority for the Court which drew upon the sovereign authority of people and mitigated the textual authority of the framers, creating a position for the Supreme Court as a popularly-sanctioned expounder of the framers' text. Wielding together the twin authorities of the founding in the institution of the Court, Marshall created a constitutional authority for the Court that recognized but marginalized both prior authorities. In this way, he relocated authority in the text itself and the judiciary as the authoritative interpreter of that text.

Role of Marshall in Creating the Court's Authority

⁵²⁶ The institutional development of the Court can be seen in numerous measures. Evidence of this process of institutional development can be seen in, for example, (1) the transition from seriatim opinions (each justice presenting an independent opinion) to the idea of an opinion of the Court (Scott Douglas Gerber, "Introduction," in *Seriatim: The Supreme Court before John Marshall*, ed. Scott Douglas Gerber, (New York: New York University Press, 1998), 20; Donald G. Morgan, "Marshall, the Marshall Court, and the Constitution," in *Chief Justice John Marshall: A Reappraisal*, ed. W. Melville Jones, (Ithaca, NY: Cornell University Press, 1956)); (2) the emergence of the figure of the Court reporter (Craig Joyce, "The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy," *Michigan Law Review* 83 (1984-85)); (3) the development of the habit of shared living and eating quarters for the Justices (Morgan, "Marshall, the Marshall Court, and the Constitution"; Robert K. Faulkner, "The Marshall Court and the Making of Constitutional Democracy," in *John Marshall's Achievement: Law, Politics, and Constitutional Interpretation*, ed. Thomas C. Shevory, (New York: Greenwood Press, 1989), 16); (4) the expansion of the rules of the Court (cf. Figure 2) (Henry Wheaton, *A Digest of the Decisions of the Supreme Court of the United States, From its Establishment in 1780, to February Term, 1820*, (New York: R. Donaldson 1821), vii-xiv); and (5) the increasing use and development of precedent by the Court (Timothy R. Johnson, James F. Spriggs, & Paul J. Wahlbeck, "The Origin and Development of Stare Decisis at the U.S. Supreme Court," in *New Directions in Judicial Politics*, ed. Kevin T. McGuire, (New York: Routledge, 2012)).

Seeking to account for the success of the American founding, Hannah Arendt argued for the institutionalization of constitutional authority in the Supreme Court as a central facet of the new nation's stability. Writing in *On Revolution*, Arendt suggested that the American founders followed the Romans in locating authority in an institution, whose existence was representative of the link back to the moment of beginning. For the Romans, this was the Senate and its connection to the ancestors, and for the Americans it was the Supreme Court and its connection to the Constitution. In Arendt's words, "The Supreme Court derives its own authority from the Constitution as a written document, while the Roman Senate... held their authority because they represented, or rather reincarnated, the ancestors..."⁵²⁷ Conceiving of success as a consequence of the creation of authority, Arendt regards the institutionalization of authority in the Court as a defining characteristic of the founding: "...that their [the Americans] revolution succeeded where all others were to fail... one is tempted to think, was decided the very moment when the Constitution began to be 'worshipped', even though it had hardly begun to operate."⁵²⁸

In locating authority in an institution (the Supreme Court), Arendt drew upon her earlier consideration of the nature of authority. In "What is authority?", Arendt sought to separate the concept of authority from power and persuasion, the former resting on coercive force and the latter presupposing an equality between parties that undermined the possibility of an authoritative relationship.⁵²⁹ Tracing Plato's attempt to forge an authority rooted in neither the persuasive norms of domestic politics nor the violent norms of foreign policy, she pointed to notion of authority as grounded in a pre-existing acceptance of the location of expert knowledge in one party to an interaction – be it in the form of captain-sailor, shepherd-flock, or doctor-

⁵²⁷ Hannah Arendt, *On Revolution*, (New York: Penguin Books, 1965), 200.

⁵²⁸ Arendt, *On Revolution*, 198-199.

⁵²⁹ Hannah Arendt, "What is Authority?" in Hannah Arendt, *Between Past and Future: Six Exercises in Political Thought*, (New York: Viking Press, 1961), 93-93.

patient; “What he [Plato] was looking for was a relationship in which the compelling element lies in the relationship itself and is prior to the actual issuance of commands.”⁵³⁰ For Arendt, the great success of the American founding lay in its creation of authority within the polity without recourse to violence.⁵³¹

As Honig has noted, Arendt believed the American founding avoided recourse to an absolute basis for its authority by harnessing the potential for authority derived from augmentation.⁵³² The worship of the Constitution drew upon the performative authority of the Declaration of Independence, and through subsequent augmentative interactions with the Constitution kept “the beginning always present.”⁵³³ Tapping the prior (and so authoritative) performance of the founding, while enacting its authority in the present, constitutional augmentation allowed for authority without coercion/violent imposition or recurrent persuasion. Indeed, the continued possibility of resistance to that authority is central to its operation - it is with the possibility of rejection of the founding that the return to the beginning (augmentation) is not recurrence to originary violence but is the return to the human capacity to originate.⁵³⁴

The institutional location of this augmentative process in the Supreme Court reflects the Arendtian definition of authority as distinct from power or persuasion. Shorn of the power of the sword or the purse, the Court’s own capacity to act rests solely upon the willingness of other

⁵³⁰ Arendt, “What is Authority?” 109.

⁵³¹ Arendt, “What is Authority?” 140. Excepting, of course, the violence that constituted the War of Independence, the extralegal violence that muted domestic opposition to it, and the *legal* violence that enforced the subsequent constitutional order (Jeremy Engels, *Enemyship: Democracy and the Counter-Revolution in the Early Republic*, (East Lansing, MI: Michigan State University Press, 2010), 117-126). As well as the metaphorical violence involved in the destruction of the pre-existing colonial polities.

⁵³² Bonnie Honig, “Declarations of Independence: Arendt and Derrida on the Problem of Founding a Republic,” *American Political Science Review* 85 (1991).

⁵³³ Honig, “Declarations of Independence,” 110. Honig remained skeptical of such an approach, contrasting it with Derrida’s belief that the performance of the Declaration of Independence marks the entry of the absolute.

⁵³⁴ Honig, “Declarations of Independence,” 110.

agents to recognize its authority. To be sure, the modern Court extends persuasive appeals in the form of its written opinions, but these speak to the particular decisions rather than its capacity to render the decisions themselves. In moments of constitutional interpretation, the Court seeks to “augment” the founding by extending and clarifying its application and relationship to contemporary America. Augmentation then, provides for an acceptance of a prior locus of “expertise” - and the institutionalization of that relationship without compulsion.

Within Arendt’s account, the process by which the Court institutionalized the augmentative capacity of society is underdeveloped. Moving quickly from the significance of the Constitution as the basis of the augmentation to the success of the Court in embodying the founding, Arendt’s description is suggestive of an instantaneous (or at least rapid and inevitable) process of institutionalization. As numerous scholars have demonstrated however, the Court’s supremacy in this area was neither immediate nor inevitable.⁵³⁵ These accounts have pointed towards institutional constraints on the Court’s ability to assert supremacy in this area, in order to posit that the process was drawn out and contested. Such institutional competition speaks in part to the emergent and solidifying institutional capacity of the Court noted in the first footnote to this chapter. However, the Court’s emergence as the institutional locus of constitutional authority equally relied upon ideological construction. As much as Arendt’s account overlooks the institutional development, it also downplays the centrality of John Marshall in creating an ideological support for the Court’s authority. Exploration of this development is crucial in

⁵³⁵ Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review*, (Oxford: Oxford University Press, 2004); Keith E. Whittington, *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History*, (Princeton: Princeton University Press, 2007); Stephen M. Engel, “Before the Countermajoritarian Difficulty: Regime Unity, Loyal Opposition, and Hostilities toward Judicial Authority in Early America,” *Studies in American Political Development* 23 (2009); Barry Friedman, *The Will of the People*, (New York: Farrar, Straus and Giroux, 2009).

understanding the Constitution's position within contemporary American society, but moreover, suggests that authority — rather than being prior — was constructed by Marshall's use of rhetorical and narrative persuasion.

Examining the development of the Supreme Court's ideological basis of authority over three crucial terms, this section will show the centrality of Marshall and the necessity of invoking the dual authorities of the framers and the people to this process. An appeal to the people's sovereignty formed the ideological basis of the Court's constitutional authority in the early Republic. Two cases — *Ware v. Hylton* (1796) and *McCulloch v. Maryland* (1819) — exemplify this invocation. In these cases the Supreme Court argued for an understanding of its role as the guardian of the constitutional settlement consented to by the people (through ratification). Moving beyond the “departmentalism” favored by the Jeffersonians, the Court positioned itself as the people's designated check upon rival political institutions. Calling upon the people's sovereign authority, the Court sought to forge a constitutional authority for itself through an institutional identification with the people and the moment of Founding.⁵³⁶ Such an identification could not be assumed, and so the Court's opinions are themselves attempts to persuade the American public of the validity of this identity. At the same time, the Court's posture as the guardian of a particular settlement brought forth the requirement of a single, authoritative understanding of the Founding and Constitution. To this end, the Court sought to fashion a highly textual mode of constitutional interpretation. Marshall's extensive opinions worked to elucidate a body of constitutional law that narrated a single, unified meaning of the constitutional text. At the heart of this project lay an uneven and unfulfilled attempt to marginalize the transitional authority of the framers as authors of the constitutional text. In *United States v.*

⁵³⁶ To this extent, Arendt's view that the Court paralleled the Roman Senate in providing a link back to the Founding moment is undoubtedly sound.

Hylton (1796) and *Sturgis v. Crowninshield* (1819), the Court offers the textual nature of the Constitution as a basis for articulation of the single “moment” for preservation and in doing so elaborates an understanding of the text as authoritative in itself and superior to ordinary law. But the Court is also required to revert to the historical context of the Philadelphia Convention to do so. Unable to fully break the hold of the framers’ power over the text, the Court seeks to hold intent as a guide to textual interpretation, not the basis of the text’s content. Through these twinned cases, the Court can be seen to unevenly address and also inscribe the tension between the framers and the people within American ideology as it sought to assert both its own authority and the possibility of a uniform meaning for the text. *Marbury v. Madison* proves pivotal within this development, but two terms of the Court, 1796 and 1819, offer important frameworks for understanding both the importance and the strategies deployed in the Supreme Court’s most famous case. In examining those cases arising in 1796 and 1819 in greater detail the ideological significance of *Marbury* and Marshall’s work therein can be better identified as a partial articulation of the willed constitutional authority of the Court and the ideological supports thereof. At the heart of this development is a deployment of persuasive rhetoric that belies Arendt’s claim that authority in the United States was created without recourse to coercion or persuasion.

Marbury v. Madison and Judicial Review

Chief Justice John Marshall’s role in the development of constitutional thought in the United States has scarcely been understated. John Brigham has suggested that each generation has its

own Marshall,⁵³⁷ but it often seems that every new incarnation supersedes the last. Writing in 1891, Lord Bryce would claim that "...the Constitution seemed not so much to rise under his [Marshall's] hands to its full stature, as to be gradually unveiled by him till it stood revealed in the harmonious perfection of the form which its framers had designed."⁵³⁸ George Haskins would suggest that to Marshall, "more than to any other single person, belongs the credit for establishing the foundations of constitutional interpretation."⁵³⁹ Robert Faulkner argued that "Marshall and his associates raised the Supreme Court from erratic obscurity to semipolitical eminence as the voice of the semisacred fundamental law."⁵⁴⁰ More recently Matthew J. Franck has described Marshall, without irony, as "the Socrates of American constitutional law."⁵⁴¹

Central to the contemporary mythology of Marshall is his role in authoring, and unifying the Court around, the opinion in *Marbury v. Madison* in 1803. The role of *Marbury v. Madison* in the history of the Supreme Court's authority has long been assumed in textbooks. Viewed as the moment in which Marshall (and the Court) claimed the authority to strike down legislation as unconstitutional, the case can be seen as the beginning of "constitutional law" within the United States.⁵⁴² The mythology of the case suggests that Marshall craftily moved between the political

⁵³⁷ John Brigham, "Political Epistemology: John Marshall's Propositions for Modern Constitutional Law," in *John Marshall's Achievement: Law, Politics, and Constitutional Interpretation*, ed. Thomas C. Shevory, (New York: Greenwood Press, 1989), 160.

⁵³⁸ Quoted in George Lee Haskins & Herbert A. Johnson, *History of the Supreme Court of the United States: Volume II Foundations of Power: John Marshall, 1801-15*, (New York: MacMillan Publishing Co., Inc., 1981), 15.

⁵³⁹ Haskins & Johnson, *History of the Supreme Court of the United States: Volume II*, 14.

⁵⁴⁰ Faulkner, "The Marshall Court and the Making of Constitutional Democracy," 13.

⁵⁴¹ Matthew J. Franck, "Union, Constitutionalism, and the Judicial Defense of Rights: John Marshall," in *History of American Political Thought*, ed. Bryan-Paul Frost & Jeffrey Sikkenga, (Lanham, MD: Lexington Books, 2003), 249.

⁵⁴² Brigham notes, for example, "Generally *Marbury v. Madison* is the first case reported in nearly every major modern constitutional law text by law professors and political scientists alike. Although it is certainly not the first constitutional case or the first Supreme Court case, *Marbury* is where our conventions situate the beginning of constitutional law." (Brigham, "Political Epistemology," 162). For example, Erwin Chemerinsky's *Constitutional Law* begins with a ten page consideration of Marshall's

threat of the Jeffersonian Republicans and the Federalist Court's desire to establish an independent base of power within the federal government. Gamely losing the battle on the day (by finding the Court unable to assist the Federalist Marbury), Marshall nonetheless positioned the Court well for the "war" by establishing a power of judicial review.⁵⁴³ However, scholars have consistently suggested that the significance of *Marbury* has been overstated and have sought to challenge the view that the case marks a pivotal point in the judicial history of the Constitution.⁵⁴⁴ Sanford Levinson infamously refuses to assign the case during his constitutional law course,⁵⁴⁵ while Mark Graber has argued that the "popular notion that *Marbury* established judicial review by judicial fiat is nonsense. ...The Judiciary Act of 1789 did far more than *Marbury v. Madison* to establish judicial power in the United States."⁵⁴⁶ Critics of the high status

opinion in the case (Erwin Chemerinsky, *Constitutional Law*, (New York: Aspen Publishers, 2009). Barron & Dienes's *Constitutional Law in a Nutshell* begins Part One, Chapter 1 with a discussion of *Marbury*, as the "seminal document" in the doctrine of judicial review, the "unique contribution of the United States to political theory" (Jerome A. Barron & Thomas Dienes, *Constitutional Law in a Nutshell*, (St. Paul, MN: Thomson Reuters, 2009), 5.

⁵⁴³ This view of the case — and its hegemony within legal instruction — owes not a little to its a characterization in *Cooper v. Aaron* (358 US 1). In the 1958 case, the Court interpreted *Marbury* to have established judicial supremacy, a fact that would have surprised earlier commentators. For example, Corwin writing in 1938 with regard to judicial supremacy would attest that "I do not find that the Court itself has ever clearly sanctioned such views." (Edward S. Corwin, "What Kind of Judicial Review did the Framers Have in Mind?" in *Corwin's Constitution: Essays and Insights of Edward S. Corwin*, ed. Kenneth D. Crews, (New York: Greenwood Press, 1986), 89). On *Cooper* and *Marbury* cf. Keith E. Whittington, "Marbury v. Madison and the Politics of Judicial Supremacy," in *Marbury v. Madison: 1803-2001: Un dialogue franco-américain*, ed. Élisabeth Zoller, (Paris: Dalloz, 2003), 170.

⁵⁴⁴ Clinton lays the blame for the high status accorded to the decision at the feet of seminal Marshall biographer Beveridge, but this seems unfair given Beveridge's claim that "Marshall, in his opinion in *Marbury vs. Madison*, did nothing more than restate that which had previously been declared by hundreds of men." (Robert Lowry Clinton, *Marbury v. Madison and Judicial Review*, (Lawrence, KS: University Press of Kansas, 1989), 190-191; Albert Beveridge, *The Life of John Marshall: Volume III*, (Boston: Houghton Mifflin Company, 1919), 118). Rakove is perhaps fairer in pointing to Alexander Bickel's "heroic image" of the Chief Justice establishing a counter-majoritarian institution as a significant point in the growing hegemony of the opinion (Jack N. Rakove, "Judicial Review Before and Beyond *Marbury*," in *Marbury v. Madison: 1803-2001: Un dialogue franco-américain*, ed. Élisabeth Zoller, (Paris: Dalloz, 2003), 39; Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, (New York: The Bobbs-Merrill Company, Inc., 1962).

⁵⁴⁵ Mark A. Graber, "Establishing Judicial Review: *Marbury* and the Judicial Act of 1789," *Tulsa Law Review* 38 (2002-2003), 609-610.

⁵⁴⁶ Graber, "Establishing Judicial Review," 610.

accorded to *Marbury* often point out that the striking down of legislation was not repeated until the ill-fated *Dred Scott* decision fifty years later,⁵⁴⁷ downplay its significance within the early Republic,⁵⁴⁸ or identify it as one episode within an inter-institutional conflict.⁵⁴⁹ Still others dispute its importance by detailing the existence of precedent and support for judicial review prior to the decision.⁵⁵⁰ Nonetheless, the case remains significant within Marshall's corpus both for the political context within which it was decided and for its consideration of the nature of a written constitution and the consequences of this nature for the Supreme Court.

The *Marbury* decision came at the crescendo of tensions between the Federalists and Republicans which had followed Jefferson's election to the Presidency, and were embodied in the issue of the judiciary's relationship to its fellow branches of government. Hobson has argued that the "opinion delivered by the chief justice, whether denounced by Republicans or hailed by Federalists, was interpreted by contemporaries almost exclusively in partisan terms."⁵⁵¹ In the Senate, debates associated with the case drew Republican charges that "enemies to the President" were attempting to subvert the executive, and that the very debates themselves were "degrogatory to [the President's] dignity." In response, Federalists expressed fears of "the most monstrous system of tyranny" should the records of the Senate on this issue not be made

⁵⁴⁷ Louis Fisher, *Constitutional Dialogues: Interpretation as Political Process*, (Princeton: Princeton University Press, 1988), 56-57.

⁵⁴⁸ Kramer, *The People Themselves*.

⁵⁴⁹ Bruce Ackerman, *The Failure of the Founding Fathers: Jefferson, Marshall, and the rise of presidential democracy*, (Cambridge, MA: Belknap Press of Harvard University Press, 2005); Engels, "Before the Counter-majoritarian Difficulty."

⁵⁵⁰ Whittington, "Marbury V. Madison and the Politics of Judicial Supremacy," 171; Rakove, "Judicial Review Before and Beyond Marbury"; Clinton, *Marbury v. Madison and Judicial Review*, 1; David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years 1789-1888*, (Chicago: University of Chicago Press, 1985), 33, 69-70; Fisher, *Constitutional Dialogues*; Gerber, "Introduction," 9-11. Cf also Beveridge, *The Life of John Marshall: Volume III*, 118.

⁵⁵¹ Charles F. Hobson, *The Papers of John Marshall: Vol. VI: Correspondence, Papers, and Selected Judicial Opinions November 1800-March 1807*, (Chapel Hill, NC: The University of North Carolina Press, 1990), 192.

available to the plaintiffs.⁵⁵² These elite debates and the case itself came at a moment of heightened hysteria over the fate of the country. In Boston, “Verus Honestus” denounced Jefferson’s support for the arrival of Thomas Paine as evidence of the former’s commitment to destroy America’s Christian faith and “open the flood-gates of profligacy and vice” as “*Voltaire* and *Rosseau* [sic] insinuated;...*Condorcet* dreamed... *Godwin* advocated... [and] *Weishaupt* designed.”⁵⁵³ In Haddonfield, New Jersey, Paine’s effigy was publicly burned with a copy of *The Age of Reason*. Reports darkly noted that “[n]o person objected to the execution of Paine; although it was observed by some, that he was invited to this country by *President Jefferson*.”⁵⁵⁴ Paine’s invitation exacerbated Federalist beliefs of the President’s longstanding “*hostility to the federal constitution... his infidelity, and hatred of Washington*.”⁵⁵⁵ The tension was not confined to the printed page; A newspaper in Providence, RI, reported that on the anniversary of Jefferson’s election in March about “150 [Federalists] paraded the streets with clubs, swords and knives in a riotous and mob-like manner, insulting and hunting at every person not of their sect.”⁵⁵⁶ By mid-March the municipal government of New York felt the need to pass an ordinance to the effect that any person displaying an effigy would be fined ten dollars.⁵⁵⁷

The federal judiciary formed a central aspect of radical Republicans’ beliefs that the Federalists had “been endeavouring ever since the revolution to establish a *monarchy* or an *aristocracy* on the ruins of our present constitution.”⁵⁵⁸ William Branch Giles would write to Jefferson in 1810 that the Revolution of 1800 would be “incomplete so long as that strong

⁵⁵² *Boston Centinel*, February 23rd/March 2nd, 1803.

⁵⁵³ *Boston Centinel*, January 8th, 1803.

⁵⁵⁴ *Haverhill Observer* (MA), February 25th, 1803. Original emphasis.

⁵⁵⁵ “Political. From the Columbian Centinel,” *New-Hampshire Sentinel*, January 15th, 1803.

⁵⁵⁶ *The Providence Phoenix*, March 5th, 1803.

⁵⁵⁷ *The Farmers’ Cabinet* (NH), March 24th, 1803.

⁵⁵⁸ “From the National Intelligencer,” *Aurora for the Country*, May 20th, 1803.

fortress [the Judiciary] is in possession of the enemy.”⁵⁵⁹ Jefferson would concur, writing to Dickinson later that year:

“on their part they [the Federalists] have retired into the Judiciary as a strong hold. there the remains of federalism are to be preserved & fed from the treasury, and from that battery all the works of republicanism are to be beaten down & erased. by a fraudulent use of the constitution which has made judges irremovable, they have multiplied useless judges merely to strengthen their phalanx.”⁵⁶⁰

For some Republicans, Marshall’s position on the Supreme Court was itself evidence of a Federalist plot to weaken Jefferson’s executive power. From his appointment in early 1801, the *General Advertiser* (later to become the *Aurora*) had reprinted articles framing Marshall as a deliberated bulwark against the popular will (embodied in Jefferson). Writing “To John Marshall” in February 1803, “Hortensius” criticized Marshall’s role in the blocking of Jefferson’s appointment - a result which would mean the “government will be at an end... the fabric of the American constitution will tumble to earth, and bury beneath its ruins the peace, the happiness, the honor, the independence of our country.”⁵⁶¹ The same month “Lucius” would address himself to Marshall in the same newspaper, warning the “Idol of [his] party” that the writer would “unveil your motives... expose you uncovered [in?] the fight of the people — your depravity shall excite their odium.”⁵⁶²

The Jeffersonian push back against the judiciary would continue into 1803, resulting in Federalist denouncements that, since 1801, the phrase “preservation of the general government”

⁵⁵⁹ Quoted in Beveridge, *The Life of John Marshall: Volume III*, 22.

⁵⁶⁰ Thomas Jefferson, “To John Dickinson, December 19th, 1801” in *The Papers of Thomas Jefferson Digital Edition*, ed. Barbara B. Oberg and J. Jefferson Looney. (Charlottesville: University of Virginia Press, Rotunda, 2008.)

⁵⁶¹ “From the Examiner,” *General Advertiser*, February 9th, 1801.

⁵⁶² “From the Examiner,” *General Advertiser*, February 19th, 1801. It should be noted that Albert Beveridge believed that Marshall’s appointment was greeted at the time with indifference: “Only the dissipated and venomous Callender, from his cell in prison, displayed that virulent hatred of Marshall with which an increasing number of Jefferson’s followers were now obsessed.” (Albert Beveridge, *The Life of John Marshall: Volumes I and II 1755-1801*, (Boston: Houghton Mifflin Company, 1916), 556).

had meant nothing more than the destruction of judicial independence.⁵⁶³ At the outset of the 1803 term the House of Representatives would impeach Judge John Pickering of New Hampshire paralleling the impeachment of Judge Alexander Addison in Pennsylvania at the same time.⁵⁶⁴ A little over two months after the Court issued its opinion in *Marbury*, Justice Chase would deliver a jury charge in Baltimore which would result in his impeachment.

Such was the political environment into which Marshall brought his opinion in *Marbury*. That he managed to negotiate the combustible political atmosphere of 1803 would give the opinion credit enough, but the decision is more - and less - than a politically savvy response to partisan pressures. Less than, to the extent that the partisan significance of the opinion has increased, not decreased, with historical time. As Beveridge noted, and others have attested to, the opinion did not excite much attention at the time; Beveridge claims that the Louisiana Purchase and the fact that only the radical Jeffersonians believed judicial review controversial meant “the first of Marshall’s great Constitutional opinions received scant notice at the time of

⁵⁶³ “Should he [a stranger] ask, what is meant by “*the preservation of the general government in its whole constitutional vigor, as the sheet-anchor of our peace at home and safety abroad?*” he must be answered, the destruction of that great bulwark of property, of safety, and of all our rights, THE INDEPENDENCE OF THE JUDICIARY – the concentration of all power in those who *claim* the exclusive possession of “the doors of public honour and confidence” – the repeal of salutary laws – changing every thing, making many things much, very much worse, and nothing better.” (*Boston Centinel*, March 9th, 1803). The accusation that the Federalists were distrustful of the people and saw the judiciary as a necessary check on them was not without merit. A Fourth of July celebration in Hanover would offer the toast of “The Sovereign People: May they conquer their greatest enemy first - *themselves*” (“Festive Celebration,” *Boston Centinel*, July 9th, 1803).

⁵⁶⁴ Beveridge, *The Life of John Marshall: Volumes I and II*, 111-112. On Pickering’s impeachment and conviction see Lynn Turner, “The Impeachment of John Pickering,” *The American Historical Review* 54 (1949). Turner’s account emphasizes the partisan interests of both sides in pushing the administrative issue of a mentally ill judge to the national stage and the resulting farcical trial. On the manner in which Addison’s trial reflected debates in Pennsylvania over the nature of the law and the judiciary in that state, in addition to the national divisions see Elizabeth K. Henderson, “The Attack on the Judiciary in Pennsylvania, 1800-1810,” *The Pennsylvania Magazine of History and Biography* 61 (1937).

delivery. The newspapers had little to say about it.”⁵⁶⁵ For Smith, it was the Federalists, rather than the Republicans, who lost most from the decision insofar as Marshall refused to directly challenge Jefferson and Madison.⁵⁶⁶ Contemporary evidence supports the view that judicial review in particular did not excite much partisan interest. The radical *Aurora for the Country* printed a series of seven essays under the signature “Littleton” from April 23rd 1803 to May 3rd 1803 listing every imaginable sin of the Court in this decision, none of which extended to its exercise of judicial review.⁵⁶⁷ The Republican house paper *National Intelligencer*, in reporting Chase’s infamous jury charge later in May, would exclude Chase’s comments on judicial review, noting only that “[Justice Chase here went into an assertion of the right of the judiciary to decide on the constitutionality of laws.]”⁵⁶⁸ If the charge as a whole was deemed as worthy of impeachment, it seems this aspect, judicial review, was not controversial enough to reprint. Even accounts emphasizing the political nature of the decision downplay the extent to which Marshall was engaged in careful partisan strategizing in order to secure judicial review.⁵⁶⁹

Marshall’s opinion is more than a political response to the extent that the text itself is an important reflection and response to questions that had been touched upon by the Supreme Court in the 1790s but never fully explored. To this extent, Marshall’s opinion in *Marbury v. Madison*

⁵⁶⁵ Beveridge, *The Life of John Marshall: Volume III*, 153; Jean Edward Smith, *John Marshall: Definer of a Nation*, (New York: Henry Holt and Company, 1996), 325; R. Kent Newmyer, *John Marshall and the Heroic Age of the Supreme Court*, (Baton Rouge, LA: Louisiana State University Press, 2001), 170.

⁵⁶⁶ Smith, *John Marshall*, 324. Smith’s account of the case places emphasis on the Ultra-federalist challenge to the judiciary in this period, positing this aspect of the environment as threat of equal import to that of the Republican’s (Smith 1996). See her description of the “irreconcilables” direct challenge to the moderate Federalist courts following the 1802 Repeal Act (Smith, *John Marshall*, 310-311).

⁵⁶⁷ “Littleton,” *Aurora for the Country*, April 23rd, 1803-May 3rd, 1803.

⁵⁶⁸ “Justice Chase’s Charge,” *National Intelligencer and Washington Advertiser*, May 20th, 1803.

⁵⁶⁹ “This account [of judicial review as the ultimate aim], however, is inconsistent with Marshall’s timorousness regarding conflict with the other branches, as reflected in his cautious action respecting the repeal of the Judiciary Act.” James M. O’Fallon, “The Politics of Marbury,” in *Marbury Versus Madison: Documents and Commentary*, ed. Mark A. Graber and Michael Perman, (Washington, DC: CQ Press, 2002), 28.

is pivotal in linking the problems emerging for the role of Court in its pre-Marshall period to the strident answers offered in the crucial 1819 term. The opinion represents a meditation on the meaning of a written constitution for the role of the judiciary. Contemplating the relationship between the people, the constitutional document, and the branches of government, the opinion explores the consequences of and for judicial review in the era of written constitutions. To be sure, Marshall's conclusions in this regard would ultimately serve his (and the Federalists') interests insofar as they worked to locate a peculiar authority in the Supreme Court itself.⁵⁷⁰ But to the extent that the opinion shaped the institutional understanding of constitutional politics in the early Republic it remains an important landmark. Moreover it is a central site of Marshall's use of persuasion and a founding narrative to establish the authority of the Constitution and the Court. O'Fallon has correctly claimed the opinion as a moment in which "the people's sovereignty became the mechanism for dismissing them from a role in preserving (or... constituting) the fundamental structure of their government."⁵⁷¹ In order to fully appreciate the work of Marshall in *Marbury* however, it is first useful to understand the questions raised by two 1796 cases: *Hylton v. United States* and *Ware v. Hylton*. Two themes within these cases — the idea of judicial review and the nature of a written constitution — illustrate the discussions of *Marbury v. Madison*.

Judicial Review in the 1796 Term

Hylton v. United States (3 Dallas 171) — the 1796 Supreme Court case concerning the carriage tax — and the justices' ambiguous claim to powers of judicial review in their opinions

⁵⁷⁰ A trend that would reach a logical conclusion in the 1819 cases.

⁵⁷¹ O'Fallon, "The Politics of Marbury," 38.

therein is a crucial data point for the argument that federal judicial review was recognized prior to *Marbury*.⁵⁷² The “carriage case” is often seen as the dog that didn’t bark of early judicial review. The opinions in *Hylton v. United States* centered on the question, as Justice Chase put it, of “whether the law of Congress, of the 5th of June, 1794, entitled, “An act to lay *duties* upon carriages, for the conveyance of persons,” is *unconstitutional and void*?”⁵⁷³ The crux of the constitutionality of the law lay in the plausible identity of the carriage tax as a direct tax. If the tax was direct, the Constitution required its apportionment amongst the states on the basis of population as per Article I, Section 2’s infamous three-fifths clause.⁵⁷⁴ The Supreme Court disposed of the issue by finding that the carriage tax was not in fact a direct tax, and so the law stood. This resolved the immediate question of the Act’s constitutionality without engaging the question of whether the Court could strike down a law of Congress. As Chase expressed it:

“As I do not think the tax on carriages is a *direct* tax, it is unnecessary, *at this time*, for me to determine, whether this court, *constitutionally* possesses the power to declare an act of Congress *void*, on the ground of its being contrary to, and in violation of, the Constitution; but if the court have such a power, I am free to declare, that I will never exercise it, *but in a very clear case*.”⁵⁷⁵

Paterson, Iredell and Wilson agreed that the tax was constitutional, affirming Wilson’s lower court decision.⁵⁷⁶ Agreeing that Congress had acted within the Constitution, the Court was not required to advance an opinion on the issue of judicial review. Nonetheless, the possibility of judicial review was raised by the case, and prompted Chase to put his above thoughts regarding the issue on record. The other justices were more reticent in this regard, but the willingness of

⁵⁷² Currie, *The Constitution in the Supreme Court*, 33.

⁵⁷³ 3 Dallas 172. Original emphasis.

⁵⁷⁴ Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.

⁵⁷⁵ 3 Dallas 175. Original emphasis.

⁵⁷⁶ Cushing, absent from the arguments, reserved judgment. (3 Dallas 184).

the Court to pass judgment on the constitutionality of legislation has prompted some scholars to argue that the power of judicial review was implicitly advanced in the opinions. “If the Court had the authority to uphold an act of Congress,” says Fisher “presumably it had the authority to strike one down.”⁵⁷⁷

The claim for implicit assertion of judicial review in *Hylton v. United States* is given support by the case of *Ware v. Hylton* in the same term. *Ware v. Hylton* (3 Dallas 199) concerned a claim from a British creditor against citizens of Virginia for a debt contracted prior to the Revolution. A Virginian law of 1779 had provided for the cancellation of debts owed to British citizens through equivalent payment to the state treasury, but following the 1783 Treaty of Paris the administrator of William Jones’s estate sued for the payment of a debt contracted by Daniel Hylton & Co. and Francis Eppes, citizens of Virginia. At stake then was the supremacy of treaties entered into by the United States over the legislative acts of the states. The case represented a subject of “uncommon magnitude” in the words of Justice Iredell, the Circuit Court judge, and brought forth arguments equal to its importance. Iredell would remark that “I shall, as long as I live, remember, with pleasure and respect, the arguments which I have heard on this case... the heart has been warmed, while the understanding has been instructed.”⁵⁷⁸ Iredell ruled in favor of the defendants, and the case was pursued to the Supreme Court. His fellow Justices apparently felt that Iredell had not been instructed enough, as they unanimously ruled to overturn his decision and side with the plaintiff.

The Supreme Court issued opinions seriatim (each justice in turn), so no single opinion of the Court emerged as definitive, but three of the four opinions (excluding Iredell who offered

⁵⁷⁷ Fisher, *Constitutional Dialogues*, 53.

⁵⁷⁸ 3 Dallas 256, 257.

only an explanation of his lower court ruling) held an understanding of the Constitution as superior to state law. Justices Chase, Paterson, and Cushing would all suggest either explicitly or implicitly that the Treaty of Paris held authority over state laws through the Constitution.⁵⁷⁹ Cushing would argue “there is no want of power, the treaty being sanctioned as the supreme law by the Constitution of the United States, which nobody pretends to deny to be paramount and controlling to all state laws...”⁵⁸⁰ Paterson crafted an opinion primarily concerned with his belief that “National differences should not affect private bargains,”⁵⁸¹ but one which nonetheless took for granted the notion that the Treaty’s “fourth article... repeals the legislative act of Virginia.”⁵⁸² Justice Chase would state that “[o]ur federal constitution established the power of a treaty over the constitution and laws of any of the states.”⁵⁸³ In the words of these opinions, it seemed beyond doubt that the supremacy of the Constitution contained the authority to narrow or strike down state laws, but to the extent that such a claim is merely an articulation of the Constitution’s Article VI commitment that “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land”⁵⁸⁴ it offers no direct support for the idea of judicial review.

However Justice Chase’s opinion in the case went further than merely stating the supremacy of the Constitution, and offered both an elaborated defense of that supremacy and a consideration of the judicial response to that claim. Read alongside *Hylton v. United States*

⁵⁷⁹ Justice James Wilson, offering the shortest response, found Virginia’s attempt to confiscate debts to be a violation of the laws of nations and a power rightly belonging to Congress not the states. (3 Dallas 281).

⁵⁸⁰ 3 Dallas 284.

⁵⁸¹ 3 Dallas 255.

⁵⁸² 3 Dallas 256.

⁵⁸³ 3 Dallas 244.

⁵⁸⁴ US Constitution, Art.IV.

Chase's opinion sketches out a democratic theory of judicial review. The development of this argument is of particular interest for the history of judicial review in the early Republic not only for its content, but also for the fact that Chase was directly addressing the claims put forward by one of the plaintiffs' advocates — John Marshall of Virginia, future Chief Justice.

Arguing for the plaintiffs John Marshall had put forward a case for understanding the courts as constrained to follow the will of the legislature. Developing a position that the law of property in a given state ought to be deemed authoritative, Marshall posited that property rights were created by, not merely upheld by, societies. Denying the existence of property in a state of nature (“...the law of property, in its origin and operation, is the offspring of the social state; not the incident of a state of nature”) Marshall moved to deny that plaintiffs' claim could be sustained either as existing during the state of war between the British and Americans (natural law), or under the law as written by Virginia (positive law). Positing the legislative authority in the realm of property to be supreme, Marshall rejected the notion that appeal could be made to the courts on the basis that the Virginia law was defective. Emphasizing that the “legislative authority of any country can only be restrained by its own municipal constitution” Marshall argued that “the judicial authority can have no right to question the validity of a law, unless such a jurisdiction is expressly given by the constitution.”⁵⁸⁵ Outside of direct authorization by the constitution, the judicial branch of any government was constrained to follow the will of the community as expressed through the legislature. While violations of “the laws of God” might fall outside this restriction, Marshall deemed this point unnecessary for inquiry in the case at hand, for “property is the creature of civil society, and subject, in all respects, to the disposition and

⁵⁸⁵ 3 Dallas 211.

control of civil institutions.”⁵⁸⁶ The role of the judiciary in such cases was to follow the guidance of the legislative body even in cases where it found itself in disagreement; “the act of the government, though disgraceful, would be obligatory on the judicial department.”⁵⁸⁷

Chase’s response was an expansive consideration of the nature of constitutional authority and the role of the judiciary in protecting the former. Accepting Marshall’s implicit claim of constitutional supremacy, Chase nonetheless tied such supremacy to the ability of the judiciary to declare acts contrary to the Constitution null and void. Chase began by considering the democratic source of all legal authority. Taking up the question of the legitimacy of the Virginian law, the Justice, regarding the people as “the genuine source and fountain of all power” deemed it within the power of the people of Virginia to arrange that commonwealth’s government as they sought fit.⁵⁸⁸ In this light, it was “unquestionable, that the legislature of Virginia, established... by the authority of the people, was for ever thereafter invested with the supreme and sovereign power of the state, and the authority to make any laws in their discretion” within the limits of their power as set out in the state’s constitution.⁵⁸⁹ Like Marshall, on this point, Chase conceded “it is the duty of [the nation’s] courts of justice not to question the validity of any law made in pursuance of the constitution.”⁵⁹⁰ Like Marshall too, Chase saw this obligation as extending to issues upon which the courts found themselves in disagreement with the legislature: “It is admitted that Virginia could not confiscate private debts without a violation of the modern law of nations; yet if in fact she has so done, the law is obligatory on all citizens of

⁵⁸⁶ 3 Dallas 211.

⁵⁸⁷ 3 Dallas 211.

⁵⁸⁸ 3 Dallas 223.

⁵⁸⁹ 3 Dallas 223.

⁵⁹⁰ 3 Dallas 223.

Virginia and on her courts of justice, *and in my opinion on all the courts of the United States.*”⁵⁹¹

The people’s originary delegation of power to the legislature, executive, and judiciary was the basis of the several branches’ authority, and, in accordance with that delegation, their powers allowed the branches to “make... to execute... and... to declare or expound, the laws of the commonwealth” respectively.⁵⁹² With regard to the laws of the states Chase agreed with Marshall that the judicial role was deference to the legislature within the constitution.

However, the Treaty of Paris and the subsequent federal constitution altered the relationship between the courts and the legislature in Chase’s analysis. The very authority — the people — which provided the basis of the Virginian legislature’s primacy over the courts prior to the federal constitution had willed the alteration of that relationship through its actions in 1787-88. To Chase’s mind, “[I]f doubts [concerning the supremacy of the Treaty of Paris over the 1779 Virginian Law] could exist before the establishment of the present national government, they must be entirely removed by the 6th article of the Constitution.”⁵⁹³ The act of the people in ratifying the US Constitution and Article VI asserted their originary authority to supersede the existing constitutions and laws of the states:

“There can be no limitation on the power of the people of the United States. By their authority, the state constitutions were made, and by their authority the constitution of the United States was established; and they had the power to change or abolish the state constitutions, or make them yield to the general government, and to treaties made by their authority.”⁵⁹⁴

The supremacy of the Treaty of Paris over state law reflected the “declared will of the people of the United States, that every treaty made by the authority of the United States, shall be superior

⁵⁹¹ 3 Dallas 229. Emphasis added.

⁵⁹² 3 Dallas 223.

⁵⁹³ 3 Dallas 236.

⁵⁹⁴ 3 Dallas 236.

to the constitution and laws of any individual state; and their will alone is to decide.”⁵⁹⁵

Chase argued that the articulation of the people’s will through the Constitution placed a new responsibility upon state and federal judges. Whereas prior to the Constitution⁵⁹⁶ judges were beholden to the delegated authority located in the state legislatures, the direct intervention of the people in the form of constitutional ratification required their deference no longer to the state legislatures but to the constitutional text itself. In their intervention “[t]he people of America have been pleased to declare that all treaties made before the establishment of the national Constitution or laws of any of the states contrary to a treaty shall be disregarded.”⁵⁹⁷ In light of this, Chase reasoned, it could not be the case that the state legislatures alone could alter the standing law (e.g. voluntarily amend the existing state laws to match the superior federal constitution and treaties supreme under it) or else “the will of a small part of the United States may control or defeat the will of the whole.”⁵⁹⁸ He concluded “it is the declared duty of the state judges to determine any constitution or laws of any state, contrary to that treaty, made under the authority of the United States, null and void.”⁵⁹⁹ Crucially, “National or federal judges are bound by duty and oath to the same conduct.”⁶⁰⁰

Chase’s opinion in *Ware v. Hylton* fell short of advocating judicial supremacy (the belief that the judiciary ought to have the final say on the constitutionality of legislation), and indeed he was careful to maintain a posture of deference to the federal legislature, distancing the judiciary

⁵⁹⁵ 3 Dallas 237.

⁵⁹⁶ And possibly the Treaty itself — Chase believed himself “that treaties made by Congress, according to the Confederation, were superior to the laws of the states,” but regarded discussion over this matter definitively settled by the US Constitution (3 Dallas 236).

⁵⁹⁷ 3 Dallas 237.

⁵⁹⁸ 3 Dallas 237.

⁵⁹⁹ 3 Dallas 237.

⁶⁰⁰ 3 Dallas 237.

from assessments as to the constitutionality of treaties entered into by the federal government.⁶⁰¹ But it nevertheless articulated a vision of the judiciary as the enforcers of federal supremacy against the states, and crucially did so on the democratic basis that the people “were the genuine source and fountain of all power.” Defining the Constitution as the will of the people, Chase carved out a role for the judiciary as the guardians of that will, charged with protecting the majority’s constitutional settlement from the dissent of state legislatures. Taking the very basis of Marshall’s resistance to judicial review of the Virginia law — that the people’s will as expressed through the legislature was supreme in regard to regulation of property — Chase fashioned a rationale for federal supremacy in which the antimajoritarian branch became the defender of majoritarian will. That John Marshall would be the primary recipient of Chase’s lesson in constitutional theory is significant to the extent that the former’s most famous opinions, *Marbury v. Madison* and *McCulloch v. Maryland* would share not a few of the premises that Chase articulated in the 1796 term.

The Written Constitution in the 1796 Term

A second important theme within these cases is the manner in which the written-ness of the Constitution relates to the possibilities for constitutional interpretation. While the relationship between *Hylton v. United States* and *Marbury v. Madison* regarding judicial review is the subject of debate, the cases do share a firm commitment to the idea that questions of the constitutionality of legislation lead back to a consideration of the intent of the text. For *Hylton* intention turns on the question of whether or not the carriage tax represents a direct form of taxation *as the framers*

⁶⁰¹ 3 Dallas 237.

would have understood it. As they considered the nature of direct federal taxation, the justices made recourse to the image of government that the framers had sought to construe in the constitutional text.

For Paterson, this recourse was expressed in the view “that the principal, I will not say, the only, objects of the framers of the constitution contemplated, as falling within the rule of apportionment, were a capitation tax and a tax on land.”⁶⁰² It was, he stated, “obviously the intention of the framers of the constitution, that congress should possess full power over every species of taxable property.”⁶⁰³ Understanding the Constitution as a work of political compromise between representatives of distinct sectional interests, the apportionment clause could only be interpreted as a protection offered to the Slave states - drawing from its existence a commitment to apportionment generally, as the plaintiff in error had argued, was “radically wrong.”⁶⁰⁴ Chase too would turn to the intent of the framers to flesh out an understanding of “direct” taxes. Construing the text of the Constitution as evidence of the framers’ intent, Chase considered that, if “there are any *other* species of taxes that are not *direct*, and *not* included within the words, *duties, imposts, or excises*, they may be laid by the rule of *uniformity*, or not; as Congress shall think proper and reasonable. If the framers of the Constitution did not contemplate *other* taxes than *direct* taxes, and *duties, imposts and excises*, there is great inaccuracy in their language.”⁶⁰⁵

Although *Ware v. Hylton* would not hinge in the same manner upon constitutional interpretation, the case did bring similar questions of interpretation to bear on treaties. As with *Hylton*, the guide to interpretation of texts (in the form of treaties) would, in the Blackstonian

⁶⁰² 3 Dallas 177.

⁶⁰³ 3 Dallas 176.

⁶⁰⁴ 3 Dallas 177.

⁶⁰⁵ 3 Dallas 173. Original Emphasis.

mode, look to authorial intent. Paterson's opinion would state that "Treaties must be construed in such a manner, as to effectuate the intention of the parties. The intention is to be collected from the letter and spirit of the instrument, and may be illustrated and enforced by the considerations deducible from the situation of the parties."⁶⁰⁶ Intention then was central, and historical context could be used to identify and clarify that on occasions when the text alone was insufficient. But Chase would once more offer a fuller conception, drawing a distinction between moments of textual clarity and moments of interpretation through reference to Rutherford and Vattel.

Chase began his consideration of treaty interpretation with the observation that the "intention of the framers of the treaty must be collected from a view of the whole instrument, and from the words made use of by them to express their intention, or from the probable or rational conjectures."⁶⁰⁷ Implicitly he argues that what must be recaptured by interpretation is intent, but he also offers three potentially distinct modes of arriving at a judgment of intention; the view of the whole instrument, the words that comprise it, or probable or rational conjectures as to the intent. These first two modes, offering a distinction between the whole instrument and particular words, provide two distinct, textual approaches to assessing intent.⁶⁰⁸ The third offers the third *non-textual* measure - conjecture as to intent — which moves entirely outside the text but does not abandon a commitment to the intent "expressed" in the text. This move reinforces Chase's commitment to the relationship between the actors "behind" a text and authoritative interpretation, but leaves open a wide array of interpretative techniques.

⁶⁰⁶ 3 Dallas 249.

⁶⁰⁷ 3 Dallas 239.

⁶⁰⁸ This distinction between the whole instrument and particular words approximately matches a division between structuralism (whole) and positivism (words) offered by Harris (William F. Harris II, "Bonding Word and Polity: The Logic of American Constitutionalism," *American Political Science Review* 76 (1982). Harris offers a further binary in his account - the distinction between immanence (text) and transcendence (spirit/practice). For a wider discussion of Harris's divisions see the section below on *Sturges v. Crowninshield*.

However, Chase offers further clarification; “If the words express the meaning of the parties plainly, distinctly and perfectly, there ought to be no other means of interpretation; but if the words are obscure, or ambiguous, or imperfect, recourse must be had to other means of interpretation... we must collect the meaning from the words, or from probable or rational conjectures, or from both.”⁶⁰⁹ This is a confusing command, requiring judges to “collect the meaning from the words” in those cases when “the words are obscure... ambiguous, or imperfect.” However, it is perhaps possible to glean a coherent meaning through the context of the next sentences:

“When we collect the intention from the words only, as they lie in the writing before us, it is a literal interpretation; and indeed, if the words, and the construction of a writing, are clear and precise, *we can scarce call it interpretation*, to collect the intention of the writer from thence. The principal rule to be observed in literal interpretation is to follow that sense, in respect both of the words and the construction which is agreeable to common use.”⁶¹⁰

Interpretation is defined here as the attempt to construct the intent of a text when the literal meaning of the text proves confused or illogical - “interpretation” as an act ought to occur only in cases when the text is not “clear and precise.” In moments when a singular meaning for the text could be disputed, rational and probable conjectures as to the intent of the actors responsible for the document are admissible in attempts to find uniform meaning. In this sense, Chase’s recommended method accords with Johnathan O’Neill’s assessment of early American constitutional interpretation, that “[a]lthough Americans occasionally consulted extrinsic sources, the usual practice, following Blackstone and the English inheritance, sought the originally intended meaning by examination of the constitutional text.”⁶¹¹ When the text failed

⁶⁰⁹ 3 Dallas 239-240.

⁶¹⁰ 3 Dallas 240. Emphasis Added.

⁶¹¹ Johnathan O’Neill, *Originalism in American Law and Politics: A Constitutional History*, (Baltimore: Johns Hopkins University Press, 2005), 15. Pushing this argument further, Jefferson H. Powell has argued that the text alone was understood as authoritative in the early Republic. Arguing that Americans in 1787-

as a record of intent, recurrence to the supposed intentions of its framers were justifiable. “Interpretation” in this sense was an act of reconstructing that intent.

These two cases then are suggestive of a judicial approach to interpretation of texts that prized intention, and understood judicial interpretation to be a recapturing of that intent. To be sure, neither case bears the claim that it offers a full theory of constitutional interpretation - *Hylton* afforded no description of the interpretative method and *Ware* concerned the meaning of a treaty, not a constitution. However, they do point to interrelationship of questions of judicial review and textual interpretation, and their existence as judicial issues in need of resolution (or at least direct engagement). The failure to offer a clear statement on either issue in 1796 means that these cases do not hold the status that *Marbury* has acquired; Indeed, the great theoretical contribution of that latter opinion was the manner in which it brought the two issues together under one head.

Marshall's Marbury

The outlines of the controversy decided in *Marbury* are well known. President Adams in departing the office of the presidency sought to rapidly process a variety of judicial appointments. One such appointment was that of William Marbury to the position of Justice of

88 looked to the interpretative models provided by statutory law - that intention was expressed in the literal meaning of a document's words, not the subjective intent of its' author - Powell suggests that “[t]he Philadelphia framers’ primary expectation regarding constitutional interpretation was that the Constitution, like any other legal document, would be interpreted in accord with its express language” ((H. Jefferson Powell, “The Original Understanding of Original Intent,” *Harvard Law Review* 98 (1985), 903). However, subsequent re-evaluation of Powell's evidence has downplayed the degree to which attention to the text itself indicated a rejection of the textual authority of the ratifiers (Charles A. Lofgren, “The Original Understanding of Original Intent?” *Constitutional Commentary* 5 (1988); Jack N. Rakove, “The Original Intention of Original Understanding,” *Constitutional Commentary* 13 (1996)).

the Peace in Washington DC. Despite Adams's signature the commission was never delivered to Marbury. Through application to the Supreme Court, Marbury sought a writ of mandamus to compel the Secretary of State, James Madison, to deliver the commission. The Court ultimately ruled that Marbury's request was justified, but that the Court lacked the authority to issue a mandamus as the legislation granting it this authority had unconstitutionally altered the distribution of original and appellate jurisdiction of the Court as outlined in the Constitution. The crucial holding in the case for constitutional law was that the Supreme Court could refuse to implement a congressional statute it deemed to be in conflict with the Constitution, that is to say, could engage in judicial review. However, scholars have differed on the exact extent of this claim. In contrast to the view that Marshall made an aggressive assertion of a hitherto unrecognized judicial right, some recent works have emphasized the limited nature of Marshall's claim⁶¹² Nonetheless, it is widely accepted that Marshall's aim was to reaffirm some sense of judicial review through his decision.⁶¹³ To do so, Marshall would offer a conceptualization of the Constitution as a record of the moment of founding and an associated understanding of that record as a written text.

Marshall's decision proceeds in three stages. In the first Marshall ascertains that Marbury does have a claim that his right to his commission has been violated. "To withhold his commission, therefore, is an act deemed by the court not warranted by law, but violative of a

⁶¹² Clinton, *Marbury v. Madison and Judicial Review*; Michael Zuckert, "Epistemology and Hermeneutics in the Constitutional Jurisprudence of John Marshall," in *John Marshall's Achievement: Law, Politics, and Constitutional Interpretation*, ed. Thomas C. Shevory, (New York, Greenwood Press, 1989); William E. Nelson, *Marbury v. Madison: The Origins and Legacy of Judicial Review*, (Lawrence, KS: University Press of Kansas, 2000); Graber, *Establishing Judicial Review*," 628.

⁶¹³ For example Thomas C. Shevory, *John Marshall's Law: Interpretation, Ideology, and Interest*, (Westport, CT: Greenwood Press, 1994), 45; Faulkner, "The Marshall Court and the Making of Constitutional Democracy"; Whittington, "Marbury V. Madison and the Politics of Judicial Supremacy"; Rakove, "Judicial Review Before and Beyond Marbury"; Newyer, *John Marshall and the Heroic Age of the Supreme Court*.

vested legal right.”⁶¹⁴ In the second part of the opinion, Marshall considers whether resort to the law is available to Marbury; “The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.”⁶¹⁵ Divining a distinction between the political and legal acts of Executive officials, Marshall finds the latter to be subject to law and as such allow for injured parties to resort to the courts.⁶¹⁶ He then turns to the final part of the opinion, a consideration of whether a writ of mandamus is the appropriate remedy and whether the Supreme Court can issue such a writ. To the first of these points Marshall finds in the affirmative (“This, then, is a plain case for a mandamus”⁶¹⁷). It is the second point that raises the specter of judicial review and contains Marshall’s consideration of the nature of the Constitution.

Marshall begins the section by quoting the 1789 act creating the federal judicial system to the effect that the Supreme Court has the power “to issue writs of mandamus.”⁶¹⁸ From here he concludes, “if this court is not authorized to issue a writ of mandamus... it must be because the law is unconstitutional.”⁶¹⁹ Comparing the statute with the Constitution’s provision that “the supreme court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the supreme court shall have appellate jurisdiction” Marshall finds a conflict. If the Court should have original jurisdiction in only the former instances, then the request for a writ of mandamus in the

⁶¹⁴ 5 U.S. 162.

⁶¹⁵ 5 U.S. 163.

⁶¹⁶ The distinction between legal and political acts has led Michael Zuckert and William Nelson to regard Marshall as advocating a narrow understanding of judicial review, applying only to legal questions. (Zuckert, “Epistemology and Hermeneutics in the Constitutional Jurisprudence of John Marshall”; Nelson, *Marbury v. Madison*).

⁶¹⁷ 5 U.S. 173.

⁶¹⁸ 5 U.S. 173.

⁶¹⁹ 5 U.S. 173.

current case would place the Court in the unconstitutional position of acting as a court of original jurisdiction in a case in which neither states nor foreign officials were parties. To take “the plain import of the words” of the Constitution, the Court should not issue mandamus unless it be shown to be “an exercise of appellate jurisdiction.”⁶²⁰ As a writ of mandamus pertains to original jurisdiction, Marshall argued that this power of the Court “appears not to be warranted by the constitution.”⁶²¹

At this point Marshall engaged the “deeply interesting” question of whether “an act, repugnant to the constitution, can become the law of the land.”⁶²² In order to do so, he offers a meditation on the nature of the Constitution which outlines and links together two characteristics of the document — its popular origin and its textual form. To Marshall’s thinking, the supremacy of the Constitution document rested upon its authority as an original act of the people:

“That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their happiness, is the basis, on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; not can it, nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.”⁶²³

This popular moment of democratic founding is then the source of the Constitution’s authority. Such a constituting act could be of two characters. It could organize the departments of government and their respective powers, or it could go further and “establish certain limits not to be transcended by those departments.”⁶²⁴ The Constitution of the United States was of latter description, creating a government but also establishing limitations upon that government. And it

⁶²⁰ 5 U.S. 175.

⁶²¹ 5 U.S. 176.

⁶²² 5 U.S. 176.

⁶²³ 5 U.S. 176.

⁶²⁴ 5 U.S. 176.

was through its written nature that such a capacity was manifest; “that those limits may not be mistaken, or forgotten, *the constitution is written*.”⁶²⁵ The people had enacted a limited government and committed those limitations to writing. If the acts of the branches of government could violate those limits then the purpose of a written constitution was rendered void; “To what purpose are powers limited, *and to what purpose is that limitation committed to writing*, if these limits may, at any time, be passed by those intended to be restrained?”⁶²⁶ It was, argued Marshall, certain that “all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation.”⁶²⁷

Marshall here linked the democratic and written nature of the Constitution together, but then went further, transferring the Court’s obligation to uphold the *democratic* constitution to an obligation to uphold the *written* constitution. Turning once more to the act of founding, Marshall equated the creation of the written text with the act of creating the limitations upon government and establishing those limits as superior law. “Certainly those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation... This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society.”⁶²⁸ The Court was necessarily involved in the enforcement of these constitutional limitations when confronted with legislation that ought to be adjudged void as a consequence of its conflict with the Constitution. As it was “*emphatically the province and duty of the judicial department to say what the law is,*” the courts were required to uphold the Constitution when ordinary law conflicted with it.⁶²⁹ “This is of the

⁶²⁵ 5 U.S. 176. Emphasis added.

⁶²⁶ 5 U.S. 176. Emphasis added.

⁶²⁷ 5 U.S. 177.

⁶²⁸ 5 U.S. 177.

⁶²⁹ 5 U.S. 177.

very essence of judicial duty,” and to do otherwise would “subvert the very foundation of all written constitutions.”⁶³⁰ Here, the separation between the notion of democratic constitution and a written constitution becomes particularly blurred. Marshall articulates a judicial duty that upholds the “very foundation of all written constitutions,” but we have earlier been told that that original foundation of all constitutions is the authority of the people. But by this later point in the opinion the people are no longer the point of reference for the authority of the text. Instead the written constitutional text has come to stand in for them, and increasingly for the very idea of popular sovereignty. Marshall continues to the effect of equating the American Revolution and founding with the establishment of written constitutions, not popular government.

“That it thus reduces to nothing what we have deemed the greatest improvement on political institutions — a written constitution — would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction.”⁶³¹

Marshall identifies here the “greatest improvement” of America to be a written constitution. This “improvement” was not the same one trumpeted by the authors of *The Federalist Papers*, who saw the application of advances in the science of politics to a notoriously unstable republican form of government as America’s great contribution. Enabling government based on “reflection and choice,” these (earlier) Federalists had deemed America as making possible a government founded on consent and popular sovereignty. Marshall subsumes the motivation for the Constitution — to enable popular sovereignty — with the Constitution itself. The document, which holds authority as the voice of the people, becomes authoritative itself, *sans* the people. By the end of the opinion the written text becomes authoritative and *self-authorizing* as to its own supremacy as Marshall claims that “Thus, *the particular phraseology of the constitution of*

⁶³⁰ 5 U.S. 178.

⁶³¹ 5 U.S. 178.

the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void.”⁶³²

O’Fallon has claimed that, “In *Marbury*, with no apparent appreciation for the irony, the people’s sovereignty became the mechanism for dismissing them from a role in preserving (or... constituting) the fundamental structure of their government.”⁶³³ Insofar as Marshall made use of the people’s authority to underpin the constitutional authority of the courts to block the actions of the elected branches, O’Fallon’s claim has merit. But the starkly partisan account of the case offered by O’Fallon, that Marshall used the popular basis of the Constitution to marginalize the (Republican) people, does not do justice to the sophisticated and potentially far-reaching transposing of authority from the people and to the text. Reducing Marshall’s actions to giving the people, in Newmyer’s words, “some good old-fashioned Federalist constitutional wisdom,”⁶³⁴ disguises a significant ideological transformation. In *Marbury*, Marshall developed the questions tentatively addressed in *Hylton v. United States* and *Ware v. Hylton*, exploiting the democratic constitutional authority sketched out by Chase to give the Supreme Court authority to assert its power of judicial review. But in merging the authority of the people and the authority of the constitutional text, Marshall also brought together the threads of textual interpretation and authority that had been present, but not conjoined, in the 1796 cases. In *Marbury* Marshall had turned to the “plain import of the words,” the contemplations of those that had formed it, and, in regards to the question of judicial authority, “the intention of those who gave this power.”⁶³⁵ To be sure, interpretative technique was not a significant aspect of the case, and Thomas Shevroy has argued that the opinion shows Marshall “willing to sacrifice methodological consistency for

⁶³² 5 U.S. 180. Emphasis added.

⁶³³ O’Fallon, “The Politics of *Marbury*,” 38.

⁶³⁴ Newmyer, *John Marshall and the Heroic Age of the Supreme Court*, 173.

⁶³⁵ 5 U.S. 179.

the sake of achieving important political ends.”⁶³⁶ Nonetheless, the opinion did bring these questions into alignment for future consideration by linking the authority of the Constitution and its textual character together. Marshall on this occasion was not required to elucidate the relationship beyond this, but in the 1819 term and its great restatement of the Constitution’s — and the Court’s — authority this relationship would return to the fore.

McCulloch v. Maryland

The 1796 cases provided a framework for the opinion in *Marbury v. Madison*, highlighting interrelated questions of judicial review, textual interpretation, and constitutional authority. In *Marbury* Marshall responded to these questions by outlining an understanding of the written constitution which relied upon the people’s ultimate authority, but which ultimately transferred that authority to the text itself. Mitigating the people’s ire towards Chase’s robust Federalism, Marshall had nonetheless put the constitutional dimensions of Chase’s thought in place. The Constitution was the voice of the people, from whom it derived its supremacy, but its interpretation would fall to the Court, giving the latter scope to counter the people’s immediate articulations in the form of legislation and the prerogative acts of the popular Executive that Jefferson sought to form. The written-ness of the Constitution provided the pivot for Marshall’s stance, embodying (and mitigating) the authority of the people and providing the textual basis for the Court’s claim to interpret. Nonetheless, *Marbury* left crucial work undone. Marshall had asserted the Court’s role in protecting the Constitution, but the partisan alignments of 1803 had made impossible an overt declaration of the Court’s institutional supremacy in constitutional

⁶³⁶ Shevory, *John Marshall’s Law*, 45.

matters. *Marbury* ended with a restatement of the fact the Constitution was “a rule for the government of *courts*, as well as of the legislature” and “...that a law repugnant to the constitution is void; and that *courts*, as well as other departments, are bound by that instrument.”⁶³⁷ As the original emphasis suggests, the opinion urged that the judicial branch be considered as able to adjudicate constitutionality *as well as* the other branches, not that it alone held that authority. Moreover, the opinion had failed to address the equally thorny matter of how to resolve constitutional questions when the meaning of the words was not clear — when conditions belied Chase’s “literal interpretation.” As the people’s authority became subsumed in the text itself, this would present itself as a more pressing issue. The 1819 term would offer an opportunity, and necessity, to return to these issues, allowing Marshall to act in a moment when the federal interest as a whole aligned with the Court’s.

The “Great Bank Case” of *McCulloch v. Maryland* has gained a foothold in history as the occasion that Marshall took to famously remind us that we ought never forget that “it is *a constitution* we are expounding,” and like *Marbury* its fame has come to have a life of its own.⁶³⁸ *McCulloch* is second only to *Marbury* in the pantheon of Marshall opinions, and in the eyes of some not even second. Justice Frankfurter would regard *McCulloch* as Marshall’s greatest opinion and Beveridge, in typically understated fashion, notes the opinion “so decisively influenced the growth of the Nation that, by many, it is considered as only second in importance to the Constitution itself.”⁶³⁹ The significance of *McCulloch* can be explained partially by its subject matter, the controversial Bank of the United States, but the opinion is significant in its

⁶³⁷ 5 U.S. 180. Original emphasis.

⁶³⁸ 17 U.S. 316 (1819), 407.

⁶³⁹ Richard K. Matthews, “Marshall v. Jefferson: Beyond “Sanctimonious Reverence” for a “Sacred” Law,” in *John Marshall’s Achievement: Law, Politics, and Constitutional Interpretation*, ed. Thomas C. Shevory, (New York, Greenwood Press, 1989), 118; Albert Beveridge, *The Life of John Marshall: Volume IV*, (Boston: Houghton Mifflin Company, 1919), 168.

own right as a compelling articulation of federal supremacy and as an opportunity for Marshall to articulate a theoretical justification of the Court's authoritative relationship vis-a-vis the Constitution. The opinion can be understood as addressing three interrelated questions of authority. The first – the authority of the federal government over the states – has been documented in numerous, if not all, considerations of the case. A second question concerns the authority of the Supreme court over questions of constitutionality. Marshall uses the opinion to address this question by a return to, and re-construction of, the process of constitutional founding in 1787-1788. In doing so, he reaches back to *Ware* to fulfill the work begun in *Marbury*. But as was the case in *Hylton*, *Ware*, and *Marbury*, the construction of the Court's authority on the basis of a written constitution touches on questions of interpretation. Here Marshall moves *against* the authority of the *Federalist Papers* – and the Philadelphia Convention – over the meaning of the document itself. In doing so, he locates the authority of text in the text itself. More so than was the case in *Marbury*, *McCulloch* utilizes the founding authority of the people to underwrite the authority of the Constitution and the Court's claim to enforce the constitutional document. In *McCulloch* Marshall pursues the argument further, constructing the Court as *the* authoritative interpreter of the constitutional text and erasing the people's and the framers' claim to authoritative interpretation. In so doing, he emphasizes an understanding of the founding as a democratic moment that seems uncontroversial – perhaps in part, because in urging us to never forget that it is a constitution we expound, he wrote into constitutional dicta, in more expansive terms than in *Marbury*, a notion of what a constitution – and its relationship to a democratic founding - actually is.

Democratic Founding in McCulloch v. Maryland

Accounts of Marshall's opinion in *McCulloch v. Maryland* tend to focus upon what Richard Ellis has described as, given the historical context of the opinion, its "extremely nationalist interpretation of the Constitution."⁶⁴⁰ As Ellis notes, Marshall conceived of the case as a return to the Federalist and Anti-federalist debates of 1787-1788 in which states rights proponents sought to return the United States to an institutional framework similar to that of the era of the Articles of Confederation. Ellis suggests that it is to this end that Marshall offers an "enduring nationalist interpretation of the origins and nature of the Constitution" which even supporters of the decision found hard to stomach.⁶⁴¹ However Marshall's framework for interpreting the founding was, in reality, very similar to the one held by a majority of Federalists in the midst of the ratification debates (including Marshall himself)⁶⁴² and articulated by Chase in 1796 and partially by Marshall himself in 1803.

During ratification, Federalists of Marshall's ilk conceived of the making of the Constitution as a two-step process in which the Philadelphia Convention proposed a document for consideration by the people. As Archibald McLaine explained to the North Carolina convention: "The Constitution is only a mere proposal... After they [Philadelphia Convention] had finished the plan, they proposed that it should be recommended to the people by the several state legislatures. If the people approve of it, it becomes their act."⁶⁴³ If ratified, the authority of the people would be lent to the document and it would become their own. In James Wilson's oft-quoted words, the constitution opened

⁶⁴⁰ Richard E. Ellis, *Aggressive Nationalism: McCulloch v. Maryland and the Foundation of Federal Authority in the Young Republic*, (Oxford: Oxford University Press, 2007), 105.

⁶⁴¹ Ellis, *Aggressive Nationalism*, 4, 105.

⁶⁴² Marshall would reflect on his participation in the ratification debates of 1787-88 in later life by recalling "the wild and enthusiastic democracy with which my political opinions if that day were tintured" (Charles F. Hobson, *The Papers of John Marshall: Vol. XI: Correspondence, Papers, and Selected Judicial Opinions April 1827-December 1830*, (Chapel Hill, NC: The University of North Carolina Press, 2002), 38.

⁶⁴³ *Debates IV*, 23.

“with a solemn and practical recognition of that principle: - “We, the *people of the United States* [...] do ordain and establish this Constitution for the United States of America.” It is announced in *their* name – it receives its political existence from *their* authority: they ordain and establish.”⁶⁴⁴

Initially produced by the Philadelphia Convention, upon ratification the Constitution becomes the work of the people, emanating from them and dependent upon them for its authority. Speaking on the behalf of Virginian Federalists in the ratification convention of that state, Marshall himself re-iterated this position in addressing challenge that the Philadelphia Convention had gone beyond its authority - stating that they (the Federalists) sought only to create “a well regulated Democracy.”⁶⁴⁵ He argued that “[t]he Convention did not in fact assume any power. They have proposed to our consideration a scheme of Government which they thought advisable. We are not bound to adopt it, if we disapprove of it.”⁶⁴⁶ It was, he claimed, “the people that give power, and can take it back. What shall restrain them? They are the masters who give it, and of whom their servants hold it.”⁶⁴⁷

In addressing the challenges of the state rights’ opponents of the Bank in 1819, Marshall returned to this model of the Constitution’s creation. Rejecting the states rights’ theory of a compact between sovereign states, Marshall denied that the Constitution emanated from the “sovereign and independent” states rather than the people, and offered a strong articulation of the Constitution as the work of the people. Marshall would state that, “The Convention which framed the constitution was indeed elected by the State legislatures. But the instrument, when it

⁶⁴⁴ *Debates II*, 434-435.

⁶⁴⁵ Herbert A. Johnson, *The Papers of John Marshall: Volume 1: Correspondence and Papers, November 10, 1775-June 23, 1788, Account Book, September 1783-June 1788*, (Chapel Hill NC: The University of North Carolina Press, 1974), 258.

⁶⁴⁶ Johnson, *The Papers of John Marshall: Volume I*, 258.

⁶⁴⁷ Johnson, *The Papers of John Marshall: Volume I*, 267.

came from their hands, was a mere proposal, without obligation, or pretensions to it.”⁶⁴⁸ Echoing Wilson, Marshall then lodges the authority of the Constitution in the people’s ratification of it: “From these [state] Conventions the constitution derives its whole authority. The government proceeds directly from the people: is “ordained and established” in the name of the people... the people were at perfect liberty to accept or reject it; and their act was final.”⁶⁴⁹ Locating the document’s authority in the people’s ratification of it, Marshall denied the states’ agency in its creation, framing it instead as the act of the people as a whole.

In his “A Friend of the Constitution” essays, written in defense of the opinion, Marshall would reiterate and clarify this position, writing:

“... the constitution of the United States is not an alliance, or a league, between independent sovereigns; nor a compact between the government of the union, and those of the states; but is itself a government, created for the nation by the whole of the American people, acting by convention assembled in and for their respective states. ... It is the act of a single party. It is the act of the people of the United States...”⁶⁵⁰

Depicting the founding as a process by which the entire people, albeit in state conventions, gave their assent to the constitutional document provided Marshall with a basis for rejecting the conception of the constitution as a compact of states. Grounding his nationalizing ruling in the establishment of a nation *by the people*, he cut the states out of the Constitution’s authorization process – as indeed Madison, and others in 1787, had hoped the ratification process would do. In *McCulloch* then he sought to expand and lay out the assumptions of popular authority that under rode the authority claimed in *Marbury*.

⁶⁴⁸ 17 U.S. 403.

⁶⁴⁹ 17 U.S. 403-404.

⁶⁵⁰ Gerald Gunther, *John Marshall’s Defense of McCulloch v. Maryland*, (Stanford, CA: Stanford University Press, 1969), 202-203.

But in *McCulloch* Marshall pushed this argument further, using this popular understanding of the founding to not only affirm constitutional review — taking constitutional from the people and locating it in the text — but also to frame the Court itself as the inheritor of the people’s authority. Once Marshall had grounded the Constitution’s authority on popular ratification, he would depict the Court as the popularly appointed institutionalization of that authority. Thus, another transfer of authority was made; authority moved from the people to the text, and then authority over the text was transferred to the Court. And once more the democratic nature of the founding was utilized to legitimize this transfer. The ability of the court to make the very ruling it was, was itself a result of the people’s sanctioning of that ability through the Constitution. The democratic authority of the Constitution was put to the service of legitimizing the Court: “On the Supreme Court of the United States has the constitution of our country devolved this important duty.”⁶⁵¹ Defending this claimed authority against challenge in his “A Friend of the Constitution” essays, Marshall elaborates: “The right asserted by the court [to decide this case], is then, expressly given by the great fundamental law which united us as a nation. ...But this is not now a question open for consideration. The constitution has decided it.”⁶⁵² As a method of under-cutting the states’ rights arguments and of establishing the authority of the court to make the decision regarding the taxation of the Bank – through an argument that the people had anointed the Court to this role - Marshall appealed to the people’s ratification for legitimation.

McCulloch and the Framers

⁶⁵¹ 17 U.S. 401.

⁶⁵² Gunther, *John Marshall’s Defense of McCulloch v. Maryland*, 208-209.

The framing of the Founding as an enactment of popular constituent power might seem second nature to us today, but at the moment of Marshall's argument it brought him into tension with another, very vital understanding of authority. In emphasizing the people's authority over the Constitution, Marshall was forced to account for the rival claim of the framers' to that document. In 1819, as today, this was no marginal claim. The arguments in the case had drawn heavily on the framers – and *The Federalist Papers*. Hopkinson arguing for Maryland had conceived of the Constitution as authored by the framers and given to the people – seeing the *Federalist Papers* as “the great champion of the constitution” whose commentary reflected those “who were supposed best to understand it.”⁶⁵³ In Hopkinson's argument, reference to the *Federalist Papers* and Hamilton's *Reports* showed the limits of the implied powers of Congress with regard to the Bank. Walter Jones arguing for Maryland was more forthright - arguing that no construction of the Constitution should

“...under a constitution of a date so recent, be put in competition with the contemporaneous exposition of its illustrious authors, as recorded for our instruction, in the “Letters of Publius,” or *Federalist*. The interpretation of the constitution, which was contended for by the State of Maryland, would be justified from that text book, containing a commentary, such as no other age or nation furnishes, upon its public law.”⁶⁵⁴

Luther Martin, the Attorney General of Maryland is recorded as merely reading “several extracts from *the Federalist*, and the *debates of the Virginia and New-York Conventions*, to show that the contemporary exposition of the constitution by its authors, and by those who supported its adoption, was wholly repugnant to that now contended for by the counsel for the plaintiff in error.”⁶⁵⁵ Even those on the side of the Bank, whose position was perhaps more strengthened by a popular basis of constitutional authority, often reached for the intention of the Convention to

⁶⁵³ 17 U.S. 345.

⁶⁵⁴ 17 U.S. 363.

⁶⁵⁵ 17 U.S. 372.

bolster their position. Pinkney, after asserting that the Constitution “springs from the people,” nevertheless felt the need to argue that his position on the constitutionality of the Bank aligned with “the authors of the constitution themselves. The members of the convention who framed the constitution, passed into the first Congress, by which the new government was organized. They must have understood their own work.”⁶⁵⁶

Marshall undercut the framers and *Federalist Papers*’ authority in two ways in his opinion. Initially, he complicated the brevity of the Constitution. The famous line “it is a constitution we are expounding” drew on Pinkney’s arguments, but Marshall adapted them to emphasize the people’s authority. Pinkney had argued that: “It was impossible for the framers of the constitution to specify prospectively all these means, both because it would have involved an immense variety of details, and because it would have been impossible for them to foresee the infinite variety of circumstances in such an unexampled state of political society as ours, forever changing and forever improving.”⁶⁵⁷ Pinkney had seen the framers’ solution to the problem of future eventualities in the creation of a popular government able to respond to those developments through implied powers. But adapting Pinkney’s argument, Marshall reconditions the brevity of the Constitution to be not a concession by the framers’ to the limits of their vision, but instead ties the brevity of the constitution fundamentally to its democratic nature:

“A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they would be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires that only its great outlines should be marked...”⁶⁵⁸

⁶⁵⁶ 17 U.S. 377, 379.

⁶⁵⁷ 17 U.S. 385.

⁶⁵⁸ 17 U.S. 405.

The inclusion of this additional point – that it would probably never be understood by the public – could be dismissed as the laying on of a further minor argument, were it not for the extensive recurrence to the authority of the people we have seen elsewhere – and, perhaps more crucially, the opportunity Marshall took to expand upon this point in his “A Friend of the Constitution” essays; *The Constitution*

*“is the act of a people, creating a government, without which they cannot exist as a people. The object of the instrument is not a single one which can be minutely described, with all its circumstances. The attempt to do so, would totally change its nature, and defeat its purpose. ... It is impossible to construe such an instrument rightly, without adverting to its nature, and marking the points of difference which distinguish it from ordinary contracts.”*⁶⁵⁹

To expound the Constitution is then to recognize, not the framers inability to see all future eventualities, but the people’s commitment to leaving themselves room to respond to those eventualities.

In a second line of argument, Marshall undercuts the framers’ authority by subtlety deflating the interpretative authority of the *Federalist Papers*. Reserving the final section of the opinion to a response to arguments drawn from the *Federalist*, Marshall notes the limits of its guidance:

*“In the course of the argument, the Federalist has been quoted; and the opinions expressed by the authors of that work have been justly supposed to be entitled to great respect in expounding the constitution. No tribute can be paid to them which exceeds their merit; but in applying their opinions... a right to judge of their correctness must be retained.”*⁶⁶⁰

By constraining the authority of the *Federalist Papers* to that of a commentary – and one that might indeed be incorrect – Marshall reaffirms the notion of the Constitution as the people’s

⁶⁵⁹ Gunther, *John Marshall’s Defense of McCulloch v. Maryland*, 170-171.

⁶⁶⁰ 17 U.S. 433.

document. He also acknowledges that the framers' intention can only have an indirect and non-authoritative influence upon constitutional interpretation. We can see here push back against the idea, witnessed in the lawyers' arguments in this case, that the framers have an authoritative relationship with the constitutional text.

McCulloch v. Maryland is then more than an important case in the federal government's growing power. It also represents a judicial affirmation of the historical narrative of the founding that we accept today. Emphasizing the founding as a moment of popular sovereignty, it locates authority in the people - and in the constitutional document, Supreme Court, and National government as they determined to lodge it. As Marshall asserts, "we must never forget, that it is *a constitution* we are expounding." Situating the claim in an ambiguous tense in which the present commits the future to acknowledge the past - we must always remember - Marshall interpellates the democracy of the founding and makes the authority of the document, court, and government assumed. Marshall's emphatic demand that we remember that it is a constitution we are expounding, represents then not merely a claim that the Constitution needed space and resources to meet unanticipated demands. It also reaffirms the ideal of the Constitution as an enactment of the people - and in framing this in historical terms, bestows upon that narrative the authority of the past. But it does so, as was the case in *Marbury*, not to establish the people's authority over the Constitution, but rather to transfer that authority to the text and then in turn to the Court as guardian of that text. The opinion worked to marginalize both the people's claim and that of the framers', rendering a constitutional text that embodied an authority derived from the former and ultimately independent of both.

Sturges v. Crowninshield

If *McCulloch* re-emphasized and extended the narrative of a popular founding to underwrite the Court's authority, it did little to address the associated questions of interpretation. As this chapter has highlighted, textual authority was associated with the issue of constitutional authority in *Hylton* and *Marbury*. As the written-ness of the Constitution was mobilized to underwrite shifts in authority it brought with it questions as to the methods of arriving at the authoritative interpretation necessary for effective judicial review. As *McCulloch* shows, Marshall had sought to marginalize both the people's and the framers' authority. What then for the idea of intent which had guided Chase's opinions in 1796? Whose intent would provide the locus of uniformity? In *McCulloch* the meaning of "necessary" had been a point of contention, but by 1819 the Bank was well established and re-chartered. The heart of that opinion was a refutation of state sovereignty and an assertion of federal supremacy – textual interpretation was a minor theme. However, the 1819 case of *Sturges v. Crowninshield* would require a resolution of this issue. In this opinion Marshall would outline a theory of the constitutional text that reversed the relationship between intention and the text, and would position the Court as authoritative in the field of constitutional interpretation.

The case of *Sturges v. Crowninshield* (17 U.S. 122) provides us with a leading articulation of Marshall's method of constitutional exegesis. In this case, concerning the ability of New York State to enforce its 1811 Act regarding the discharge of debts in the case of insolvency, the Court was called upon to judge the constitutional meaning of the contracts clause.⁶⁶¹ As with the other monumental cases of 1819, *Dartmouth College v. Woodward* (17

⁶⁶¹ "No State shall... pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts..." (US Constitution Art. I Sec. 10)

U.S. 518) and *McCulloch v. Maryland*, the decision in the case would have significance for the developing political economy of the Republic. A central case in the Supreme Court's protection of the federal government's interest in developing a national economy, *Sturges v. Crowninshield*, like *McCulloch*, was decided within a framework of institutional and political conflict between the states and federal government and over the nature of commercial relations in the growing republic. At stake were questions of federal supremacy, the sanctity of contract, and the relationship between insolvency, bankruptcy, and imprisonment within a democratic republic.⁶⁶² It was, in the words of the *New York Daily Advertiser*, potentially "one of the most important decisions that has ever occurred."⁶⁶³

The ability to take on and discharge debt in a predictable manner had been deemed of such importance at the time of the Constitution's creation that a commitment to a uniform bankruptcy law was written into the text itself.⁶⁶⁴ Alongside a commitment to the protection of copyrights and patents and to the creation and maintenance of the post offices and roads, Article 1 Section 8 committed the federal government to uniform rules of naturalization and bankruptcy. Even Anti-federalist writers had conceded that the lack of uniform bankruptcy legislation had hurt the young nation.⁶⁶⁵ Nonetheless, Congress had failed to maintain uniform regulation in the sphere of bankruptcy since the 1805 repeal of existing legislation, providing scope for the states

⁶⁶² For a detailed discussion of the case and its position within Marshall's economic thought see Herbert A. Johnson, "Federal Union, Property, and the Contract Clause: John Marshall's Thought in Light of *Sturges v. Crowninshield* and *Ogden v. Saunders*," in *John Marshall's Achievement: Law, Politics, and Constitutional Interpretation*, ed. Thomas C. Shevory, (New York, Greenwood Press, 1989).

⁶⁶³ Reprinted in the *Alexandria Gazette & Daily Advertiser*, March 2nd, 1819.

⁶⁶⁴ "The Congress shall have the power... To establish... uniform laws on the subject of bankruptcies throughout the United States." (U.S. Constitution Art. I Sec. 8)

⁶⁶⁵ From the *Letters from a Federal Farmer* on the failings of the state legislators: "...several legislatures, by making tender, suspension, and paper money laws, have given just cause of uneasiness to creditors." On the powers to be ideally given to a national government: "...and to a few internal concerns of the community; to the coin, post-offices, weights and measures, a general plan for the militia, to naturalization, and, perhaps to bankruptcies..." (Federal Farmer "Letters to the Republican," in *DHRC digital*. Original emphasis).

to fill the void. *Sturges* represented a challenge to one such instance of state legislation, that of New York State. The particular concern creditors had in regard to New York's legislation lay in its commitment to discharge the debts of an individual found to be insolvent. The constitutional challenge to the New York act could be — and was — made on at least two grounds; that it violated the supremacy of the federal government in the realm of bankruptcy, and that it violated the contracts clause of the Constitution by allowing debts to be discharged without payment. Initially then the case forced Marshall to make a ruling on whether the federal government's supremacy extended to barring state legislation in areas in which, despite constitutional grants, the federal government had failed to legislate. Marshall disposed of this challenge quickly noting that "the right of the States to pass a bankrupt law is not taken away by the mere grant of that power to Congress... it can only be suspended, by the enactment of a general bankrupt law."⁶⁶⁶

The remaining question was whether New York's law violated the contracts clause. A judgment on this issue required a definition of what was meant by the restriction on a law "impairing the Obligation of Contracts." Like the opinions in *Marbury* and *Hylton v. United States*, this task required the Court to offer an authoritative — singular and uniform — interpretation of the text. As with those cases, the Court would again turn to norms of authorship in order to meet this challenge. The intention of the framers would be a recurrent theme in both the arguments of both sides and the final ruling of the Court. Set alongside Marshall's consideration of the manner in which constitutional exegesis ought to take place, the invocation of the framers in this opinion provides an important instance within the institutionalization of the framers within legal thought and a significant counterpoint to the popular constitutional authority emphasized in *McCulloch*. Nonetheless, the invocation of the framers intent would not

⁶⁶⁶ 17 U.S. 196.

understand the text's authority to be derived from its (the text's) existence as a record of authorial intention. Instead, the invocation of intent would be to the end of providing historical context as a guide to the meaning of a text, the authority of which was internalized in the text itself.

Adjudicating the question of the constitutionality of New York's law, Marshall would consider that legislation's commitments against those of the contracts clause of the Constitution. The Chief Justice determined that claim that the Constitution allowed for such legislation ought to be "tried by the words of the section," and in Marshall's estimation was found to be wanting by that standard.⁶⁶⁷ The Court's opinion would be that the New York statute, insofar as it worked to discharge individuals from freely contracted debts, violated the contracts clause and was therefore contrary to the constitution of the United States.⁶⁶⁸ But it was with regard to the issue of insolvency that Marshall would outline a detailed interpretative approach. The unclear distinction between insolvency and bankruptcy laws⁶⁶⁹ had enabled the argument to be made that the existence of insolvency laws at the time of the Constitution's ratification proved that the intent of the Philadelphia Convention had been not to infringe such state legislation. Marshall rejected the argument that insolvency laws conflicted with the "spirit" of the Constitution as framed by the Philadelphia Convention, noting that the effect of these laws was usually to "discharge the person of the debtor, but leave his obligation to pay in full force."⁶⁷⁰ Nonetheless, the presentation of a claim based on the supposed intentions of the Convention gave Marshall scope for responding to such arguments.

⁶⁶⁷ 17 U.S. 204.

⁶⁶⁸ 17 U.S. 208.

⁶⁶⁹ Although the divisions between the two were unclear, Marshall's opinion works with a broad distinction that bankruptcy was taken to refer to the ability to discharge a debt while insolvency concerned imprisonment for debt.

⁶⁷⁰ 17 U.S. 203.

In responding to the deployment of arguments offering the Constitution's "spirit" as a basis for striking down legislative acts, Marshall would reject the idea that the spirit could be superior to the text, stating that, "although the spirit of an instrument, especially of a constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words."⁶⁷¹ Accepting (as Chase had earlier done) that where "words conflict with each other, where the different clauses... would be inconsistent unless the natural and common import of words be varied, construction becomes necessary,"⁶⁷² the Chief Justice nevertheless favored an interpretive approach grounded in the text itself. Use of the "spirit" or supposed intent of drafters could only legitimize a rejection of the plain meaning of the text in the most extreme circumstances:

"If, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, united in rejecting that application."⁶⁷³

The application of the contracts clause to the case at hand, was to Marshall's mind, "certainly not such a case."⁶⁷⁴

Nonetheless, recurrence to the context and understandings of the Convention marks Marshall's consideration of the extent of the restrictions imposed by the contracts clause. To illustrate this the opinion is quoted at length:

"A general dissatisfaction with that lax system of legislation which followed the war of our revolution undoubtedly directed the mind of the Convention to this subject... The attention of the Convention, therefore, was particularly directed to paper money, and to acts which enabled the debtor to discharge his debt, otherwise than was stipulated in the contract. Had nothing more been intended, nothing more would have been expressed, But, in the opinion of the Convention,

⁶⁷¹ 17 U.S. 202.

⁶⁷² 17 U.S. 202.

⁶⁷³ 17 U.S. 203.

⁶⁷⁴ 17 U.S. 203.

much more remained to be done. ...The Convention appears to have intended to establish a great principle, that contracts should be inviolable. The constitution, *therefore*, declares, that no State shall pass “any law impairing the obligation of contracts.”⁶⁷⁵

Marshall would then conclude that

“[I]f, as we think, *it must be admitted that this intention might actuate the Convention; that it is not only consistent with, but is apparently manifested by, all that part of the section which respects this subject*; that the words used are well adapted to the expression of it; that violence would be done to their plain meaning by understanding them in a more limited sense; those rules of construction, which have been consecrated by the wisdom of ages, compel us to say, that these words prohibit the passage of any law discharging a contract without performance.”⁶⁷⁶

From these extended quotations it seems that the intention of the Convention did have significance for interpretation. How then did Marshall relate intent and the text?

The editor of Marshall’s papers, Charles F. Hobson, has argued that *Sturges v. Crowninshield* is reflective of Marshall’s belief that “[t]he particular intentions of particular framers... should not be confused with the intention of the instrument itself.”⁶⁷⁷ It is correct to argue, as Hobson does, that for Marshall the text ought to be given preference over the spirit; Marshall would affirm his position on this point in 1814 by defining the judiciary as the department which pursues “only the law as written” in *Brown v. United States* (12 U.S. 110, (1814)). Even so, Marshall also views the text as having potential to exceed the intentions of its drafters. Writing to Bushrod Washington on the subject of bankruptcy law in 1814, Marshall would actually argue that bankruptcy laws were not in the minds of the members of the Philadelphia Convention when considering the impairment of credit, but that they were nonetheless included by the text itself: “Paper money, the tender of useless property, & other

⁶⁷⁵ 17 U.S. 205-206. Emphasis added.

⁶⁷⁶ 17 U.S. 206. Emphasis added.

⁶⁷⁷ Charles F. Hobson, *The Papers of John Marshall: Vol. VIII: Correspondence, Papers, and Selected Judicial Opinions March 1814-December 1819*, (Chapel Hill, NC: The University of North Carolina Press, 1995), 242.

laws acting directly on the engagements of individuals were the objects of general alarm & were probably in the mind of the convention. Yet the words go further; if they do on a fair & necessary construction, they must have their full effect.”⁶⁷⁸ But the reliance upon the convention’s mindset in order to develop a sense of the constitutional protections of the contracts clause seems to belie Hobson’s claim that the text was understood as authoritative *at the expense of the framers’ intent*. The relationship between the two is rather more complex, and in exploring it the significance of Marshall’s appropriation of authority can be better understood. It is not the case that Marshall consigned the intent of the framers to the realm of the Constitution’s spirit for the simple reason that the binaries of spirit and letter, and text and intent cannot be neatly collapsed into each other within Marshall’s thinking.

Intention, in *Sturges*, is regarded not as an alternative to the “literal” interpretation of the words and clauses, but rather as auxiliary support for that literal interpretation. The intention of the framers is put to the service of the text in the opinion, providing a support for Marshall’s position that meaning cannot extend beyond the text as written. The invocation of the framers in the opinion often works to reinforce the text as understood by Marshall, not to provide that understanding in the first place. For example:

“It seems scarcely possible to suppose that the framers of the constitution, if intending to prohibit only laws authorizing the payment of debts by installment, would have expressed that intention by saying “no State shall pass any law impairing the obligation of contracts”...No court can be justified in restricting such *comprehensive words* to a particular mischief to which no allusion is made.”⁶⁷⁹

And

“The fair, and, we think, the necessary construction of the sentence, *requires, that we should give these words their full and obvious meaning*. A general

⁶⁷⁸ Hobson, *The Papers of John Marshall: Vol. VIII*, 34-35.

⁶⁷⁹ 17 U.S. 205. Emphasis added.

dissatisfaction with that lax system of legislation which followed the war of our revolution undoubtedly directed the mind of the Convention to this subject.”⁶⁸⁰

Alongside these invocations come expressive commitments to the authority – and plain meaning – of the text itself; “Was the general prohibition intended to prevent paper money? We are not allowed to say so, because it is expressly provided, that no State shall “emit bills of credit;””⁶⁸¹ and “The words of the constitution, then, are express, and incapable of being misunderstood. They admit no variety of construction...”⁶⁸² Framer intent is not rejected as pertaining to the sphere of the Constitution’s “spirit,” but rather provides a support for the plain meaning of the text.

To attempt to understand the consequences of the relationship Marshall sees between intent and the text it is useful to draw upon William F. Harris’s deep consideration of the nature of the constitutional text. In his article “Bonding of Word and Polity: The Logic of American Constitutionalism,” (1982) Harris outlines two binaries within interpretative practice.⁶⁸³ The first, positivism v. structuralism, draws a distinction between approaches to constitutional interpretation that, in the case of the former, focus “on words and clauses, which are viewed as commands” as opposed to structuralist approaches that emphasize “coherent designs and wholes.”⁶⁸⁴ The second division, immanence v. transcendence, denotes an understanding of the Constitution which (in the case of immanence) “requires that constitutional meaning be confined within the text or close to its ambit,” or an alternative in which focus extends “beyond the text... [to] the active conception of meaning, the projection of implications and the drawing of

⁶⁸⁰ 17 U.S. 205.

⁶⁸¹ 17 U.S. 204.

⁶⁸² 17 U.S. 198.

⁶⁸³ Harris, “Bonding of Word and Polity.”

⁶⁸⁴ Harris, “Bonding of Word and Polity,” 37.

inferences from within the defined scope of the political order”⁶⁸⁵ (Cf. Figure 3). Immanence can be understood broadly as a reliance upon the upper-case “Constitution” — the textual document — while transcendence draws upon the lower case “constitution” of the institutions, practices, and values that exist and inform our collective political lives.

Within Harris’s schema Marshall’s approach to interpretation is located within the realm of immanence, reflecting his commitment to drawing interpretative conclusions from the text alone. But the existence of the second axis within Harris’s account points to a complexity that belies the stark division of text and spirit suggested by Hobson. Immanence can be both positivist and structuralist. Which is to say that *sola Scriptura* interpretations (the text alone) can look to either the meaning of particular words and clauses (positivism) or to the overall meaning of the text as a document (structuralism). Tellingly, Marshall appears in Harris’s account as an exemplar of both approaches at different points locating the Chief Justice firmly in the realm of immanence but moving between a positivism reliant upon the literal meaning of the text and a structuralism based on the broader understanding of the Constitution as a complete document.⁶⁸⁶ Which is to say, moving between the meaning of the words and the intent of the constitutional project, but always looking to the text as the touchstone from which each is derived.

In this sense, Marshall’s rejection of the “spirit” of the Constitution is not a rejection of the intention of the framers’ per se, but rather a rejection of the transcendent realm as a legitimate basis of constitutional interpretation. What remains after such a rejection is not a text as the record of its creation/the intention behind it, but instead a text as an authoritative documentation of the legitimate sphere of politics. Harris characterizes the creation of the

⁶⁸⁵ Harris, “Bonding of Word and Polity,” 37.

⁶⁸⁶ Harris, “Bonding of Word and Polity,” 38, 39.

American Constitution as the “wresting [of] the three-dimensional contours of a new public order from the two-dimensional realm of thought and theory,”⁶⁸⁷ but thereafter the Constitution operates as an attempt to constrain the three dimensional political world through management of its two dimensional representation. Thomas Jefferson articulated this view in relation to the constitutionality of a national bank, in his view that to “take a single step beyond the boundaries thus specially drawn around the powers of Congress [by the Constitution], is to take possession of a boundless field of power, no longer susceptible of any definition.”⁶⁸⁸ From Harris’s view of a three-dimensional world brought into being from two-dimensional thoughts,⁶⁸⁹ the authority of the Constitution emerged as two-dimensional construct (“the boundaries drawn around the powers of Congress”) constraining the three-dimensional world (“a boundless field of power, no longer susceptible of any definition”). What remains after this transformation is a constitutional document that stands outside (around?) the sphere of “politics,” marking the latter’s acceptable two dimensional limits but not subject to the contestation over meaning and understanding of which politics partially comprises. Marshall’s commitment to constitutional immanence raises the authority of the text itself above and out of the reach of “transcendental” discussions over rights, justice, and political (as opposed to *constitutional*) theory.

In this sense, Marshall’s use of the Philadelphia Convention in *Sturges* works to reinforce the broader projects of *Marbury* and *McCulloch*, making use of the history of the founding in

⁶⁸⁷ Harris, “Bonding of Word and Polity,” 34.

⁶⁸⁸ Thomas Jefferson, “Opinion on the Constitutionality of the Bill for Establishing a National Bank,” in *The Papers of Thomas Jefferson Digital Edition*, ed. Barbara B. Oberg and J. Jefferson Looney, (Charlottesville, VA: University of Virginia Press, Rotunda, 2008).

⁶⁸⁹ A description reminiscent of those “these vain and bustling projectors” against which conservatives on both sides of the Atlantic rallied (Richard H. Dana, *Oration Delivered Before the Washington Benevolent Society at Cambridge, July 4, 1814*, (Cambridge, MA: Hilliard and Metcalf, 1814), 6; Edmund Burke, *Reflections on the Revolution in France*, (Indianapolis, IN: Hackett Publishing Company, 1987), but amongst whom the Federalists themselves ought to be truthfully counted (Sheldon S. Wolin, “Tending and Intending a Constitution: Bicentennial Misgivings,” in Sheldon S. Wolin, *The Presence of the Past: Essays on the State and the Constitution*, (Baltimore, MD: The Johns Hopkins University Press, 1989).

order to isolate the authority of the constitutional text. Whereas those cases saw the people invoked in order to marginalize their constitutional authority, *Sturges* presents the presence of the framers in the service of furthering the textual authority internal to the document, marginalizing the framers' own *authorial* textual authority. Building on the denial of framer authority touched on in *McCulloch*, Marshall in *Sturges* provides a mode of "interpretation" in which the Court is responsible for laying out the plain meaning of the text, not deriving the intention that the text might be a record of. The text operates as something other than a documentary record of the original intention; its words provide the substance of the Constitution against which legislative and executive acts ought to be compared.

In *Sturges* we see the necessary additional dimension of Marshall's crafting of the Court's authority vis-a-vis the constitutional text. For the Court to be authoritative in this regard the authority of the Constitution had to be rendered distinct from the actual actors involved in the document's creation. Highlighting the people's authority for the text (in *McCulloch*) marginalizes the claim of the framers' to authority over the text. Inverting the relationship between intention and text works to the same end. Coupled with the conceptualization of the written Constitution as authoritative at the expense of the people offered in *Marbury*, the Court emerges as the authoritative interpreter of a constitutional document, the authority of which derives from the text itself. The impersonal Constitution, which in Michael Warner's analysis had interpellated the whole,⁶⁹⁰ becomes through Marshall the mechanism by which the people's authority is eroded and the counter-majoritarian judiciary's is aggrandized.

⁶⁹⁰ "By constituting the government, the people's text literally constitutes the people. In the concrete form of these texts, the people decides the conditions of its own embodiment. The text itself becomes not only the supreme law, but the only original embodiment of the people." (Michael Warner, *Letters of the Republic: Publication and the Public Sphere in Eighteenth-Century America*, (Cambridge, MA: Harvard University Press, 1990), 102).

Conclusion

Taken together, these cases highlight Marshall's use of rhetoric and narrative in order to construct the Supreme Court's constitutional authority. This construction of this authority indicates that it was neither a prior product of the relationship between Court and country, nor was it independent of persuasion or force. Crucially, the Court's embodiment of the link between the contemporary moment and the founding was aggressively asserted in Marshall's opinion, not assumed. Moreover, the constitutional authority would not serve a link to the persons of the framers but would marginalize their understanding in rejecting both intention and the *Federalist Papers* as authoritative. Democratically, Marshall's development of the Court's constitutional authority both required and ultimately rejected the people's authority over the textual constitution. Required, in order that the supremacy of the text – and so by extension its judicial interpreters – could be given a democratic basis. Rejected, insofar as the Court's authority would reduce the ability of the people to intervene in a constitutional order embedded in a fixed text.

Set against the increasing association of the Constitution with the persons of the framers that was occurring with popular culture and which has been explored in earlier chapters, this development represents the people's gradual loss of control over their own Constitution. In popular culture the people ceded this authority to the pseudo-historical figures of the founding fathers. In the legal sphere, the people's authority was utilized and diluted in favor of the Supreme Court. These developments ascribed the people's and the framers' authority into constitutional discourse, but worked to actualize that authority only in the case of the framers and

in the form of cultural authority. The people would be rendered the basis of the Court's counter democratic authority.

This depiction of the course of constitutional authority in the early Republic presents a challenge to Arendt's account of the founding. The working out of the Court's authority was not an immediate development, and nor was it directly the basis of the Revolution's "success." By the late Antebellum period, then-President Lincoln – no opponent of the Constitution's authority – would reject the position that "the policy of government...is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made." The infamous decision of the Taney Court in *Dred Scott* would rock the authority of the Court, bringing to a head the disjuncture between the Constitution's problematic racial dimension and the increasing opposition to the institution of slavery. That tension, as we will see, would itself drive forward debates about the authority of the Constitution and the framers.

But, constraining attention to the role of Marshall, we should, in light of his role in shaping the Court's constitutional authority, take seriously the characterization of Marshall's agency given in the toast offered in Washington on the 4th of July 1831 – "John Marshall - One of the fathers of the Constitution, and its highest official expounder." Not the passive inheritor of the authority of the founding depicted by Arendt, instead Marshall is better understood as active participant in the process of founding authority in and for the Supreme Court. In this sense, Marshall is perhaps a founder of authority more so for his efforts on the bench, then his efforts in Virginia in 1788.

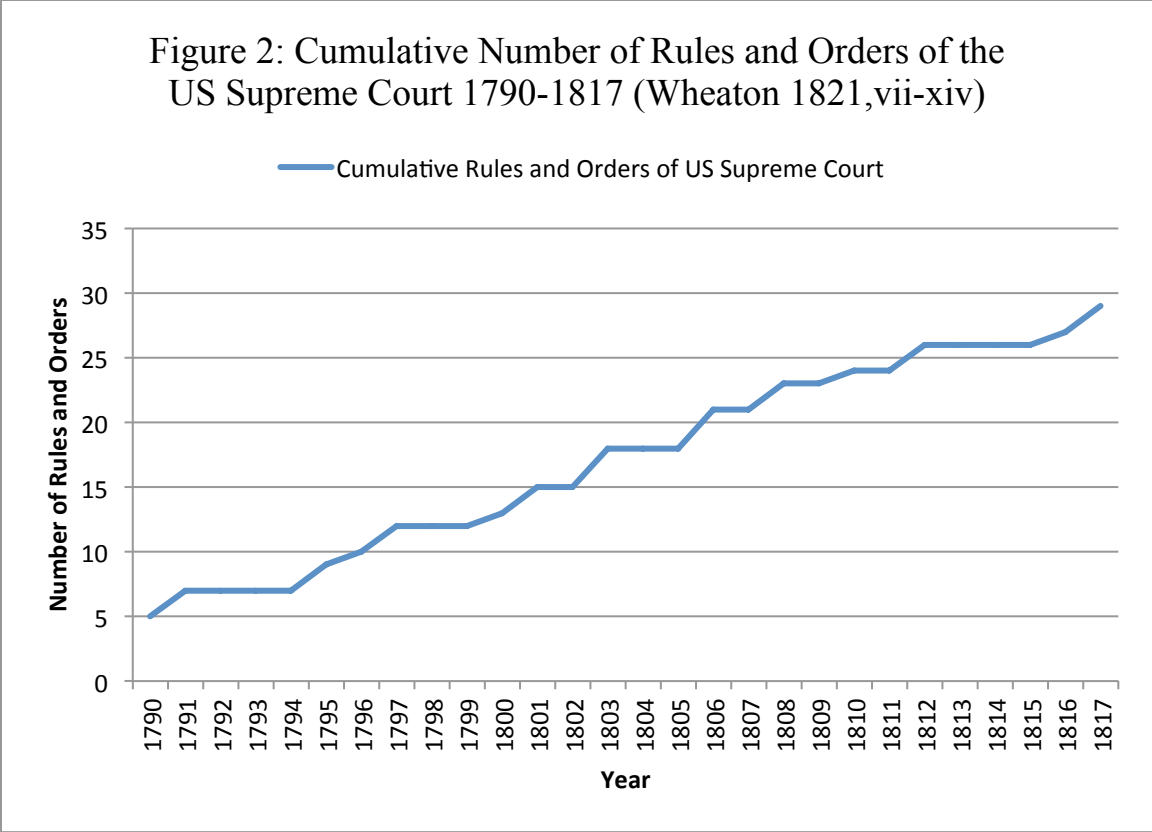


Figure 2: Cumulative Number of Rules and Orders of the U.S. Supreme Court 1790-1817

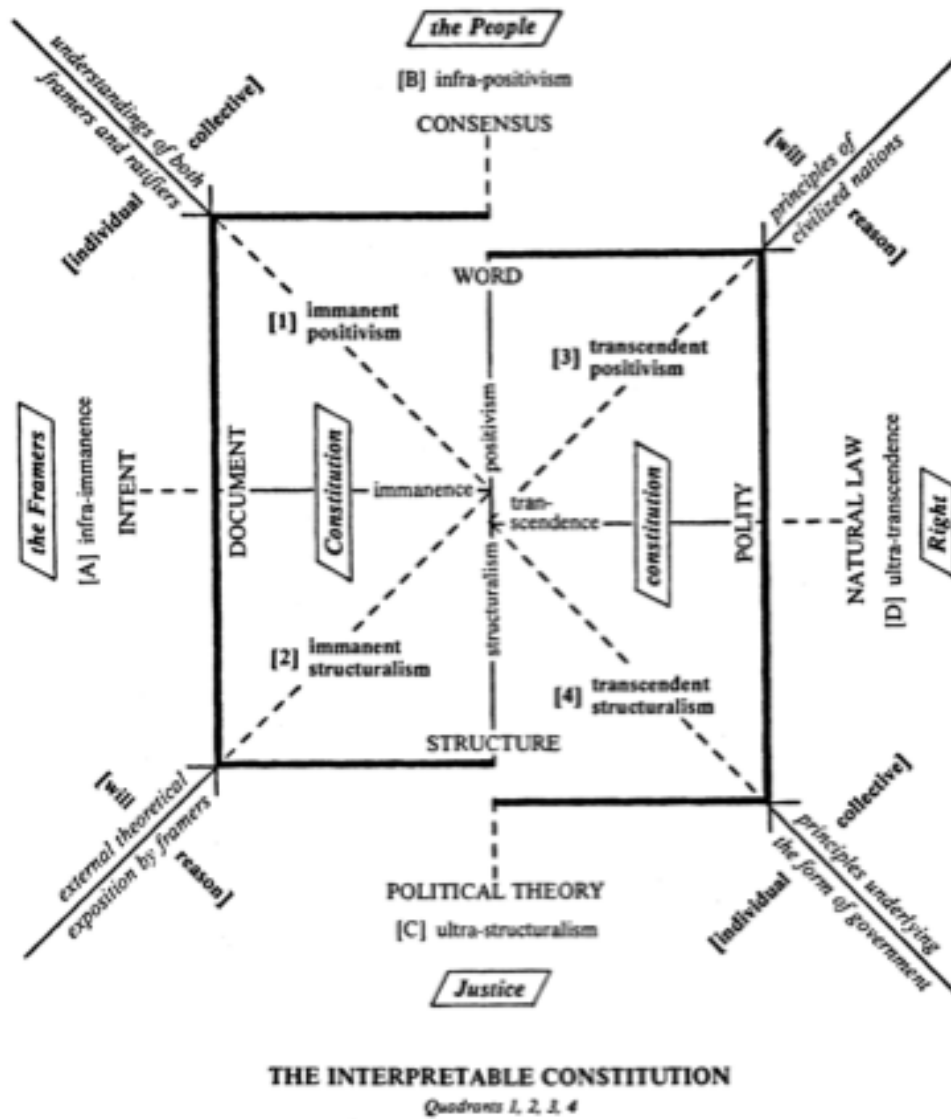


Figure 3: The Interpretable Constitution from Harris, "Bonding Word and Polity," 38.

Chapter 5: Abolitionism, The American Party System and Framer Intent

“Let us confess that, as a nation, we are disgraced.”
Amasa Walker⁶⁹¹

“We shall offend our southern brethren.”
William J. Snelling⁶⁹²

As we have seen, the preservation of the Constitution took on cultural importance in the political discourse of the 1820s and 1830s. The Constitution came to be understood as an inheritance from the founding generation that subsequent generations were charged with handing on to their children in tact. The 4th of July celebrations linked the constitutional document ever more closely to the authors of it and identified it as authoritative within American political culture. At the same time developments in legal culture saw the Marshall Court utilize the people’s historical authority during ratification to weaken the people’s contemporary authority over the Constitution. In such a way the Constitution’s position within legal and non-legal culture diverged. Within legal culture the Constitution became increasingly removed from the people, creating a basis of interpretation internal to the document itself and supported by a burgeoning body of judicial precedent. Outside of this sphere, the document became increasingly removed from the people insofar as it grew tied to the identities of the framers and relegated their role to one of preservation. In both instances, the text of the Constitution remained the locus of interpretative endeavors. Even as the framers’ authority became more pronounced, it was not the case that this readily transferred into an abandonment of text-centered constitutional understandings.

⁶⁹¹ *Proceedings of the New-England Anti-Slavery Convention, Held in Boston on the 27th, 28th and 29th of May, 1834.* (Boston: Garrison & Knapp, 1834), 12.

⁶⁹² *The Abolitionist* 1:4 (1833), 53.

Within the emergence of the abolitionist movement in the 1830s, the understandings of the Constitution in both the North and the South underwent a revision. As abolitionists pushed for the ending of slavery in the District of Columbia, their opponents were required to offer a basis for rejecting congressional authority in this area. The very explicit grant of power to Congress to regulate the District made it near impossible for advocates of slavery to fashion a text-oriented constitutional argument against interference. In response to abolitionist demands, their opponents offered a compact theory of the Constitution that forbade reform – or even discussion – of slavery in Washington on the basis of a duty to maintain the spirit of compromise that had enabled agreement in 1787-88. Raising the spirit of compromise to the level of – and at times above – the constitutional text itself, these actors moved beyond an understanding of heroic preservation of the constitutional document and towards a duty to protect the spirit of the Constitution as defined by the intentions and actions of agents in 1787-88.

This radical re-evaluation of the Constitution was resisted by abolitionists and dough-faces alike, both of whom shied away from any commitment to the idea that interference in slavery in the District of Columbia was unconstitutional. Nonetheless, they adopted the presumption of the compact theory that the intentions of actors during ratification were significant in understanding the Constitution. For Van Buren and his followers, the spirit of the framers came to be regarded as binding on contemporary political actors. For abolitionists, the ability to show that the framers had intended the abolition of slavery became a vital rhetorical tool. In accepting this framework for constitutional discussions, Van Buren and the abolitionists moved away from the text-oriented framework that had been dominant in popular and legal discussions (albeit in very different ways). And ultimately, for the abolitionists, it would mean the fracturing of their movement into two distinct understandings of the Constitution.

This chapter examines the emergence of the abolitionist movement and its interactions with the Constitution.⁶⁹³ The chapter outlines the development of abolitionism in the North and ideological resistance to it in the South. The abolition of slavery within the British Empire spurred the American abolitionist movement to understand slavery as a peculiarly American sin, one tied to the Constitution and symbolically enacted in the nation's capital. This development pushed abolitionists to both begin to see the Constitution as possessing a spirit alongside its text and to demand abolition within Washington, D.C. with greater urgency. At the same time, slaveholder insecurity resulting from Nat Turner's Rebellion and the maturing of the American system of slavery resulted in a South intolerant of abolitionist activities. Fashioning a constitutional response, slaveholders posited a new compact theory of the Constitution. The chapter then demonstrates that the compact theory was in turn responded to by Martin Van Buren and by the abolitionist movement in the form of acceptance of the premise of framer intent.

⁶⁹³ The sources utilized in this investigation differ from those offered in other parts of the dissertation. The initial tracing of constitutional interpretations looked to newspapers as representations of public opinion, while the Fourth of July celebrations provided public enactments that might be regarded as having a degree of popular support by dint of their reliance on immediate audience approval. This chapter however makes use of public reports (for pro-slavery messages) and abolition pamphlets (for abolitionist messages). As such, some account of this shift is perhaps required. A crude explanation lies in the lack of newspaper coverage of the arguments of the abolitionists, whose arguments many regarded as having the effect of destabilizing the Union. Shunned as extremists, they were forced to open their own newspapers (of which the *Liberator*, the *Genius of Universal Emancipation*, and the *North Star* are only the most famous). However, during the period under examination perhaps only the *Liberator* existed as a significant and enduring abolitionist sheet, closely tied to the views of its editor, William Lloyd Garrison. As such newspapers from the period offer limited scope for understanding the broad development within the abolitionist movement of constitutional thought. Instead, their pamphlets and minutes of conventions allow access to the movement's internal ideological discussions and to this end are more enlightening. The reliance on governmental reports to illustrate pro-slavery thought is desirable for two reasons. Firstly, the official expressions of these views evince the degree to which the claims they offer were not merely Southern extremism, but actually accepted within "respectable" debate. Secondly, the locus of the debates over slavery in the District of Columbia was within Congress. It was Congress (along with the State legislatures) that was required to respond to abolitionist pressure, not newspaper editors in the South. Thus, it is in official messages that the interplay of these claims takes place overtly. Elsewhere, the efforts to frame the abolitionists as extremists did not necessitate – and would perhaps have been undermined by – the formulation of a coherent response to their conception of the Constitution.

Abolition and the Constitution

With the creation of William Lloyd Garrison's *Liberator* in 1831 the nation — and the prevalent gradualist abolitionist movement — received, in the words of the Vermont Anti-Slavery Society, a “shock, as if this nation had been shaken by an earthquake.”⁶⁹⁴ Picking up the cause of immediate abolition whose figurehead David Walker had died suddenly in 1830,⁶⁹⁵ and with the financial support of free Blacks in the North who constituted the majority of the readership, Garrison's paper and associated activism provided a focal point for a movement which self-consciously rejected the aims and operation of the American Colonization Society.⁶⁹⁶ Rejecting the gradualism of the Colonization Society, Garrison discounted “Moderation, under such circumstances, [as] deliberate barbarity... calmness [as] marble indifference.”⁶⁹⁷ Taking aim at the Colonization Society, “the great Babel of our country,” Garrison denounced “the origins, the designs, and the movements of this great red dragon, red with the blood of the poor innocents.”⁶⁹⁸ Positioning itself against methods which “stigmatize[d] as foreigners” those whose “fathers fought bravely to achieve independence” and sought to “send them to a barbarous continent,” an uncompromising abolition movement committed to immediacy and which

⁶⁹⁴ *First Annual Report of the Vermont Anti-Slavery Society. Presented at Middlebury, February 18. 1835.* (Montpelier: Knapp and Jewett, 1835) 8.

⁶⁹⁵ Daniel Walker Howe, *What Hath God Wrought: The Transformation of America, 1815-1848*, (Oxford: Oxford University Press, 2009), 425.

⁶⁹⁶ James Forten provided \$54 for subscriptions on its first day of publication in order to pay for the paper upon which it was printed. Garrison would state that “I seriously question whether there would ever have been a *Liberator* printed had it not been for that timely remittance.” In 1834 whites still only comprised a quarter of the paper's subscribers. Benjamin Quarles, *Black Abolitionists* (New York: Oxford University Press, 1969), 20.

⁶⁹⁷ William Lloyd Garrison, *Address Delivered in Boston, New-York and Philadelphia, Before the Free People of Color, in April 1833.* (New York, 1833), 13.

⁶⁹⁸ Garrison, *Address Delivered in Boston... 1833*, 16.

identified print as the means of achieving it arose with Garrison acting as figurehead.⁶⁹⁹ A year after the founding of the *Liberator*, the New-England Anti-Slavery Society gave an institutional concreteness to the movement and *The Abolitionist* provided an official publication.⁷⁰⁰ The year-end of 1833 saw the creation of the National Anti-Slavery in Philadelphia, followed by a mushrooming of affiliates across the northern states such that the national organization could list 527 societies in appendix to its third annual report in mid-1836.⁷⁰¹

The focus on immediate abolition reflected to an important extent an understanding of slavery not as a declining institution in need of a political solution but as a moral wrong demanding action on the part of professing Christians. At the annual meeting of the New-England Anti-Slavery Society in 1833, Rev. E. M. P. Wells listed his objections to slavery in order thus: “1. Slavery is inconsistent with Christianity. – 2. It is inconsistent with humanity. – 3. It is inconsistent with the principles of a republican government.”⁷⁰² In an anonymous pamphlet “*A Plea for the Slave Addressed to All Professing Christians in America*,” the writer urged Americans to “not be indifferent to slavery because it is said to be a political question. It is eminently a religious one, and cannot be safely neglected by any who would cultivate “pure religion and undefiled before God.””⁷⁰³ Central to this objection to slavery was the latter’s

⁶⁹⁹ William Lloyd Garrison, *Address delivered before the Free People of Color, in Philadelphia, New-York, and Other Cities, during the month of June, 1831*. (Boston: Stephen Foster, 1831), 19, 21. In the same speech Garrison would urge the “Free People of Color” to “Multiply periodicals among yourselves, to be conducted by men of your own color. The cause of emancipation demands at least one hundred presses.” (10).

⁷⁰⁰ *The Abolitionist* 1:1 (1833), 1, 2.

⁷⁰¹ *The Abolitionist* 1:12 (1833), 177; *Third Annual Report of the American Anti-Slavery Society; With Speeches Delivered at the Anniversary Meeting, Held in the City of New-York, On the 10th May, 1836, and the Minutes of the Meetings of the Society for Business*. (New York: William S. Dorr, 1836), 89-99.

⁷⁰² *The Abolitionist* 1:2 (1833), 17.

⁷⁰³ *A Plea for the Slave Addressed to All Professing Christians in America*. 1832.

failure to recognize that the slave “is constituted, by God, a moral agent.”⁷⁰⁴ To the Abolitionists, slaveholding in the form of ownership of other humans was “contrary to the law written on the human heart, as well as in the holy scriptures,”⁷⁰⁵ and a violation of “that law, unchangeable and eternal... that man can [not] hold property in man.”⁷⁰⁶ Slavery was sinful, aside from the immoral claim to have ownership over another, because it denied to the slave “the beams of gospel consolation, to which every *Christian* is entitled.”⁷⁰⁷ William Oakes of Ipswich articulated this directly in stating that “We seek to abolish slavery, that the slaves may be a reading population, and may be supplied with the Bible.”⁷⁰⁸ That slavery was a religious question denied to American Christians the luxury of gradual reform. The Anti-slavery students of Union College avowed that “slaveholding is a heinous crime in the sight of God; and that duty, safety and the best interests of all concerned, require its *immediate* abandonment.”⁷⁰⁹

However, if the system of slavery was inherently sinful, it was through the Constitution that this immorality spread to the souls of the abolitionists themselves. The Constitution made the existence of slavery in the southern States a sin for those in the North as it required the latter’s acquiescence and — more significantly for the abolitionists — potential active support for slavery. Fearful that a slave rebellion would see the northern militias called in to service in

⁷⁰⁴ “Preamble to the Constitution of the Anti-Slavery Society of Lane Seminary,” *American Anti-Slavery Reporter* 1:5 (1834), 76.

⁷⁰⁵ *Proceedings of the New York Anti-Slavery Convention, Held at Utica, October 21, and New York Anti-Slavery State Society, Held at Peterboro’, October 22, 1835.* (Utica, NY: Standard & Democrat Office, 1835), 16.

⁷⁰⁶ Garrison, *Address delivered before the Free People of Color... 1831*, 24.

⁷⁰⁷ Edwin P. Atlee, *An Address to the Citizens of Philadelphia, on the Subject of Slavery, Delivered On the 4th of 7th Month, (July,) A.D. 1833.* (Philadelphia: Wm. P. Gibbons, 1833), 10.

⁷⁰⁸ *Proceedings ...New-England Anti-Slavery Convention... 1834*, 9.

⁷⁰⁹ *First Annual Report of the Union College Anti-Slavery Society, With an Address to Students, and an Appendix.* (Schenectady, NY: S. S. Riggs, 1836), 4.

the South, abolitionists saw the congressional power to suppress insurrections⁷¹⁰ as enlisting them as participants in the perpetuation of slavery. William Snelling told the New-England Anti-Slavery Society that:

“We have, by acceding to the Federal Constitution, solemnly and as a people, guaranteed the continuance of slavery. We, that is all of us between eighteen and forty-five, are liable to be called to suppress, what we should call rebellion, but what all other nations will call a glorious revolution.”⁷¹¹

The *Anti-Slavery Reporter* in September of the same year, 1833, printed John G. Whittier’s call for immediate abolition. Central to this claim were the North’s constitutional ties to slavery. Whittier rejected the view that New England had no interest in slaveholding;

“New-England is not responsible? Bound by the United States Constitution to protect the slaver-holder in his sins, and yet not responsible? Joining hand with crime – covenanting with oppression – leaguering with pollution, and yet not responsible!”⁷¹²

The Constitution, Whittier asserted, bound the North’s militia to active protection of the slave system. “Slavery is *protected* by the constitutional compact – by the standing army – by the militia of the free states.”⁷¹³ The constitutional requirement to return of those held under service or labor was also understood by abolitionists to bind them to the immoral system.⁷¹⁴ The October 1833 *Abolitionist*, listing the proof that the “American nation... approves and encourages slavery,” made point number one that “The constitution of the United States binds, as far as it can, the people of the northern States, to restore runaway slaves to their owners.”⁷¹⁵ Even as it

⁷¹⁰ Article I, Section 8: “To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions”

⁷¹¹ *The Abolitionist* 1:3 (1833), 35.

⁷¹² *Anti-Slavery Reporter* 1:4 (1833), 51.

⁷¹³ *Anti-Slavery Reporter* 1:4 (1833), 51.

⁷¹⁴ Article IV, Section 2: “No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.”

⁷¹⁵ *The Abolitionist* 1:10 (1833), 158.

rejected its moral authority, the First Annual Report of American Anti-Slavery Society, concluded that through the constitutional requirement to return fugitives, Americans in the North had been “*hired* to abet oppression — to be the tools of tyrants”⁷¹⁶ Constitutionally tied to the South, northern abolitionists identified with the guilt of slavery as “a nation, then, until we do something to amend our constitution and laws.”⁷¹⁷ Immediate abolition was the only response to “all the iniquity of Slavery,” for all the United States “are responsible for the shame and guilt of slavery.”⁷¹⁸ Abolition was, said Garrison in 1834, “aimed at the redemption of the whole land... We [are] all in bondage.”⁷¹⁹ The Constitution, underwriting the Union of the sections, made the sin of slavery a stain on northern as well as southern souls.

Despite this, in the initial period of Garrisonian abolition at least, the Constitution’s role in binding the abolitionists to slavery did not necessitate its rejection. While the early abolitionists identified the Constitution as central to their complicity in slaveholding, they also understood the text itself as a somewhat amoral framework for federal governance. Even as it bound them to slavery, it offered a means by which slavery might be addressed. The Providence Anti-Slavery Society declared themselves satisfied “that we have no other purpose but to overthrow a most unrighteous and cruel system, *by the means pointed out in the Constitution of the Republic*, for the improvement of our civil and social state.”⁷²⁰ The U.S. Constitution was an important abolitionist resource insofar as it guaranteed the abolitionists the free speech needed to

⁷¹⁶ *First Annual Report of the American Anti-Slavery Society; With the Speeches Delivered at the Anniversary Meeting, Held in Chatham-Street Chapel, in the City of New-York, on the Sixth of May, 1834, and by Adjournment on the Eighth, in the Rev. Dr. Lansing’s Church; And the Minutes of the Meetings of the Society for Business.* (New York: Dorr & Butterfield, 1834), 58.

⁷¹⁷ *The Abolitionist* 1:10 (1833), 159.

⁷¹⁸ *Anti-Slavery Reporter* 1:4 (1833), 51; *The Abolitionist* 1:10 (1833), 159.

⁷¹⁹ *Proceedings ...New-England Anti-Slavery Convention...1834*, 13.

⁷²⁰ Providence Anti-Slavery Society, *Abolition Principles* (1833), 2. Emphasis added.

spread their literature,⁷²¹ but also as it offered resources by which to problematize and harry slavery itself. In their “Address to the People of the United States,” New England abolitionists conceded that “It is true that slavery, as it exists in our country, is supported by law, and by the constitution as it is generally understood”⁷²² but they questioned the belief that this required acquiescence. “Ought it not” they asked “to be to us the most powerful inducement, to use every means which the constitution has left us, to remove this fatal inconsistency with the vital principle of our social institutions?”⁷²³ The *Anti-Slavery Reporter* argued that “while we confine ourselves within the strictest construction of the constitutional rights we do not intend to be precluded from urging any measure which the constitution warrants.”⁷²⁴

Such measures included the use of the constitutional protection of free speech to urge a constitutional amendment,⁷²⁵ but more significantly they also involved the proffering of the Constitution as a basis for opposing slavery. Although unlikely to persuade slaveholders, abolitionists invoked constitutional clauses such as the ban on cruel and unusual punishments,⁷²⁶ the privileges and immunities clause,⁷²⁷ and the guarantee of republican government,⁷²⁸ in order to juxtaposition the Constitution and the reality of slavery. Furthermore, they emphasized the lack of specific reference to slavery in the constitutional document in order to challenge the view that it was inherently pro-slavery. At the American Anti-Slavery Society’s Annual Meeting in 1834 Rev. Samuel J. May denied the that the “constitution sanctions slavery” as neither “slavery

⁷²¹ *Proceedings ...New-England Anti-Slavery Convention...1834*, 68.

⁷²² *Proceedings ...New-England Anti-Slavery Convention...1834*, 65.

⁷²³ *Proceedings ...New-England Anti-Slavery Convention...1834*, 65.

⁷²⁴ *Anti-Slavery Reporter* 1:5 (1833), 73.

⁷²⁵ For example, Theodore Sedgwick, *The Practicability of the Abolition of Slavery: A Lecture delivered at the Lyceum in Stockbridge, Massachusetts, February, 1831*. (New York: J. Seymour, 1831).

⁷²⁶ *Proceedings ...New-England Anti-Slavery Convention...1834*, 57.

⁷²⁷ *Anti-Slavery Reporter* 1:1 (1833), 15.

⁷²⁸ *Anti-Slavery Reporter* 1:4 (1833), 56

nor slaves are mentioned in the constitution. The words are not there.”⁷²⁹ Garrison noted that the Constitution “knows nothing of white and black men... it is broad enough to cover [colored] persons; it has power enough to vindicate [their] rights.”⁷³⁰ The Constitution, Garrison proclaimed, “stands, firm as the rock of Gibraltar, a high refuge from oppression.”⁷³¹

Notwithstanding the text’s proclaimed neutrality, it was in the invocation of the Constitution’s symbolic authority that the abolitionists most actively sought to break the association of slavery with the Constitution. The abolitionists understood the Constitution as intimately linked to the Declaration of Independence and as such an embodiment of the spirit of the founding period. Resurrection of that spirit would, they argued, lead to the ending of slavery.⁷³² The *Anti-Slavery Reporter* asked:

“What is *our* duty? To give effect to the *spirit* of our Constitution; to plant ourselves upon the great Declaration ... to loose at once the bands of wickedness — to undo the heavy burdens, and let the oppressed go free.”⁷³³

The Declaration provided a spirit or ethos to the Founding independent of the constitutional text but nonetheless equally — or indeed, given the willingness to amend the text, more — binding on subsequent generations. “We will,” Garrison asserted, “*preach* the DECLARATION OF

⁷²⁹ *First Annual Report of the American Anti-Slavery Society... 1834...*, 20.

⁷³⁰ Garrison, *Address delivered before the Free People of Color... 1831*, 15.

⁷³¹ Garrison, *Address delivered before the Free People of Color... 1831*, 15.

⁷³² The invocation of “spirit” in this manner has echoes of Montesquieu’s understanding of law as façade covering the “spring” of the political system. For Montesquieu, republican virtue and monarchical honor provided a basis upon which the mechanistic laws could function while drawing the populace together in pursuit of a common end. With reference to honor in a monarchical system, he says “Honor sets all parts of the body politic in motion, and by its very action connects them; thus each individual advances the public good, while he only thinks of promoting his own interest.” For the abolitionists, the spirit of the Constitution is that which breathes life into the text and which binds the American people to a constitutional project. Charles de Secondat de Montesquieu, *The spirit of the laws*, translated by T. Nugent. & F. Newman, (Hafner Pub. Co., New York, 1949), 25.

⁷³³ *Anti-Slavery Reporter* 1:4 (1833), 55.

INDEPENDENCE, till it begins to be put in PRACTICE.”⁷³⁴ To be sure, there was nothing radical in tapping the spirit of ’76 for rhetorical purposes - by the 1830s this was a well worn political technique. But in using the Declaration as a prism for understanding the Constitution, the abolitionists could frame their actions as constitutional and patriotic. A month after defining its duty in terms of effecting the constitutional spirit, the *Anti-Slavery Reporter* would reason that “in seeking the abolition of slavery we conform to the spirit of the constitution, and are strictly within the letters of it, is plain from the fact, that this venerated instrument gives no sanction to a system so abhorrent to the principles of ’76.”⁷³⁵ Here 1776 was radically collapsed into 1787 — the principles of ’76 belie the possibility that the document of ’87 included slavery within its spirit. The interplay between the philosophical Declaration of 1776 and the mechanistic document of 1787 within abolitionist literature infused the latter text with the spirit of — and perhaps more crucially, the promise of — liberty. In early 1834, the *American Anti-Slavery Reporter* asserted that “The Constitution of our Union is framed with a view to liberty and not slavery, and the hearts of freeman cannot forever slumber over the wrongs of the bleeding, the destitute and the oppressed.”⁷³⁶

As the *Reporter’s* description of unsettled hearts suggests, the infusion of the Constitution with the spirit of the Declaration led to a shift from the prevailing constitutional discourse of heroic preservation. As we have seen in the 4th of July celebrations of the 1820s and 1830s, attitudes towards the Constitution were coalescing around an understanding typified by President Jackson’s view that “The Constitution is still the object of our reverence, the bond of our Union, our defence in danger, the source of our prosperity in peace. It shall descend, as we

⁷³⁴ William Lloyd Garrison, *Address in Commemoration of the Great Jubilee, Of 1st August, 1834*, (1834), 3.

⁷³⁵ *Anti-Slavery Reporter* 1:5 (1833), 73.

⁷³⁶ *American Anti-Slavery Reporter* 1:5 (1834), 73.

have received it, uncorrupted by sophistical construction, to our posterity...”⁷³⁷ The duty of those sharing Jackson’s deference to the Constitution was to guard against encroachments upon the constitutionally settled division of power. Jackson thundered in the direction of South Carolina, that “The letter of this great instrument is free from... radical fault... The sages, whose memory will always be revered, have given us a practical, and... permanent constitutional compact.”⁷³⁸ Patriotism in this understanding meant a commitment to preservation. But with the notion of a constitutional spirit derived from the Declaration, the abolitionists conceived of the Constitution at risk not from degeneration but rather constriction; their role was completion, not preservation. The existence of slavery marked an aspect of the nation unfulfilled by the Constitution’s spirit of liberty. Reverence for the Founding required the extension of that spirit to the slave and the completion of the constitutional project. “And although our fathers left their great work unfinished, it is our duty to follow out their principles. Short of Liberty and Equality we cannot stop without doing injustice to their memories.”⁷³⁹ The task of “completing” the Constitution was directly linked to a notion of inheriting an unfinished constitutional project from the founders of the American state. Its spirit and aims were the abolitionist’s chosen inheritance from the founders, as opposed to the Madisonian distribution of power.

Thus, the early 1830s abolitionists’ understanding of a *spiritual* Constitution gave them scope to understand their rejection of the slaveholding provisions of the document as conformable to the Constitution. Moreover, it provided the possibility of a constitution which extended beyond the fragile text inherited from 1788, both in terms of drawing upon the principles of 1776 and in providing a constitutional framework for the moral struggle of the

⁷³⁷ *President Jackson’s Proclamation Against the Nullification Ordinance of South Carolina, December 11, 1832.* (1832), 8.

⁷³⁸ *Jackson’s Proclamation*, 8.

⁷³⁹ *Anti-Slavery Reporter* 1:4 (1833), 55.

1830s. The “Declaration of the National Anti-Slavery Convention” construed their mission in light of this: “We have met together for the achievement of an enterprise, without which, that of our fathers is incomplete, and which... as far transcends theirs, as moral truth does physical force.”⁷⁴⁰ As this suggests their mission moved them beyond the founders’ settlement and towards a more expansive one. Textual preservation was rejected in favor of spiritual completion, and the text was regarded as an imperfect (albeit binding) rendering of what was “constitutional.” The higher spiritual form of the Constitution made it possible for abolitionists to avow that “our course is the only one by which slavery can be abolished, consistently with the Constitution.”⁷⁴¹

Far from the outright rejection which saw Garrison burn the Constitution in 1854, the “immediate” abolitionists of the early 1830s held a profoundly complex view of the Constitution. Conceiving it both to be the basis of their implication in the immoral slave system of the southern States and as the means by which the immoral system could be overturned, abolitionists could simultaneously advocate amendment and completion. Implicitly regarding it as possessing both a spiritual and textual form, they resisted the prevailing Jacksonian attitude of “heroic preservation,” and instead advocated a fidelity to the founders which would be actualized by the repudiation of slavery. They called on “the Patriot, — the friend of liberty and the Union of the States, [to] no longer shut his eyes to the great danger”⁷⁴² and asserted that the “very reputation of our fathers...demanded”⁷⁴³ emancipation. However as the 1830s continued two issues would sharpen the constitutional dimensions of abolition. The emancipation of the slaves in the British Empire and the continuation of slavery in Washington D.C. worked in turn to Americanize the

⁷⁴⁰ *The Abolitionist* 1:12 (1833), 178.

⁷⁴¹ *Anti-Slavery Reporter* 1:5 (1833), 73.

⁷⁴² *Anti-Slavery Reporter* 1:4 (1833), 61-62.

⁷⁴³ *Anti-Slavery Reporter* 1:4 (1833), 55.

existence of slavery and to provide a geographical area in which a national debate over slavery could be joined. Both heightened the urgency of abolition in the minds of the abolitionists, and the latter forced opponents of abolition to offer constitutional understandings to counter those of the abolitionists.

Americanization of Abolition/Slavery

Three months before the formation of the National Anti-Slavery Society in December 1833, news reached American shores of the abolition of slavery in the British colonies. From late July news that provisions of an abolition bill had passed the House of Commons two weeks earlier was circulating in the United States,⁷⁴⁴ and by late September confirmation of its passage by both Houses arrived.⁷⁴⁵ The news that the nation that Americans had fought a revolution against had acted to abolish slavery throughout its colonies was greeted with mixed feelings by Americans abolitionists. *The Abolitionist* noted the development with equal parts jubilation and melancholy; “This glorious act of the British nation, presents a mortifying contrast to the conduct of our own.”⁷⁴⁶ Nevertheless, the journal saw a positive in the fact that the United States remained alone amongst the English-speaking world in maintaining slavery: “The abolition of slavery in the British colonies, cannot be looked upon with unconcern in the United States... When the British king put his name to the statute... he signed the death warrant of slavery throughout the civilized world.”⁷⁴⁷ Believing the moral influence of the British abolition would be irresistible in the United States, the abolitionists looked forward to “the moral force of the

⁷⁴⁴ *Albany Argus*, 30th July 1833, 3; *Alexandria Gazette*, 30th July 1833, 2.

⁷⁴⁵ *Eastern Argus*, 27th September 1833, 2; *The Farmers' Cabinet*, 27th September 1833, 3.

⁷⁴⁶ *The Abolitionist* 1:10 (1833), 154.

⁷⁴⁷ *The Abolitionist* 1:10 (1833), 156.

great body of the people” being roused to “exterminate at once and forever” the system of American slavery.⁷⁴⁸ As it became apparent that they waited in vain for such an uprising, and that the United States would remain an outpost of slavery in the Anglo-American world, abolitionist thought drew more strongly on the idea that they faced a particularly American sin.

That Americans were peculiarly compromised ideologically by the existence of slavery in the United States was an observation that pre-dated the British abolition of colonial slavery. At least since Samuel Johnson had sarcastically enquired “how is it that we hear the loudest yelps for liberty among the drivers of negroes?,”⁷⁴⁹ the incongruities between the rhetoric of the American Revolution and the existence of slavery had been recognized. “Slavery” a 1825 correspondent to the *Boston Recorder* wrote “is not only indefensible upon the general principles of right, but it is in flagrant opposition to the genius of our government.”⁷⁵⁰ In *A Disquisition on Egyptian, Roman and American Slavery* published in 1831 Kentucky, “Onesimus” wrote that with regard to the “heinous crime” of slavery, “above all people in the world, the Americans ought to be the most ashamed of it.”⁷⁵¹ The root of that shame lay in the hypocrisy of a nation which had “declared to the world, in defiance of kings and despots, that men are by *nature* equal and free” and “staked the lives, fortunes, and sacred honour of her sages upon this maxim, and who [held] up the beacon of liberty to an astonished world” but which had failed to address slavery.⁷⁵² Should the discrepancy have been missed by Americans, the reproaches of the Irish champion Daniel O’Connell on America and George Washington in particular for their

⁷⁴⁸ *The Abolitionist* 1:10 (1833), 156.

⁷⁴⁹ Samuel Johnson, *Taxation no Tyranny; An Answer to the Resolutions and Address of the American Congress*, (London: T. Cadell, 1775), 89.

⁷⁵⁰ Vigornius, “Slavery. No. IV” *Boston Recorder*, 15th July 1825, 116.

⁷⁵¹ Onesimus, *A Disquisition on Egyptian, Roman and American Slavery*, (Louisville, KY: Norwood & Palmer, 1831), 31.

⁷⁵² Onesimus, *Disquisition*, 32.

slaveholding highlighted the distance between the rhetoric of the “asylum of mankind” and its reality. Americans could only fume as O’Connell named Bolivar a more virtuous revolutionary for liberty than General Washington and quoted their own Declaration of Independence back at them.⁷⁵³ Even those more gradualist than the Garrisonian abolitionists recognized that for slaves to remain in bondage longer than was absolutely necessary was “irreconcilable with every principle that constitutes this republic a glorious nation.”⁷⁵⁴

Nonetheless, the 1833 abolition of slavery in the British colonies presented something of a minor crisis of identity. Anticipation of the British reform and the relative conducive environment for abolition there had given the American abolitionists pause even before the passage of the Act. Leaving for the British Isles in the Spring of 1833, Garrison addressed meetings with the observation that

“I propose to leave this free republican, christian country, and go to one in which there is a king and a proud nobility; but where my denunciations against the persecution and oppression of your color will be received, not as in this country with astonishment, and rage, and scorn, but with loud cheers – with thunders of applause!”⁷⁵⁵

When confirmation arrived that this country, of “a king and a proud nobility,” had acted where the United States apparently could or would not, the stark contrast jolted the abolitionist movement. “Let it not be said,” pleaded the October 1833 *Anti-Slavery Reporter*, “that in *free* America, truth and the sentiments of humanity, have less sway than in the monarchies of the old world.”⁷⁵⁶ At the New-England Anti-Slavery Convention the following year, Rev. John Blain noted, that to the sixth of the population held in bondage, “the 4th of July is no day of

⁷⁵³ *Richmond Enquirer*, 17th November, 1829, 4; *The Repertory*, 12th November 1829, 2; *Connecticut Journal* 1st December 1829, 4.

⁷⁵⁴ A Citizen of New-York, *Remarks Upon A Plan for the Total Abolition of Slavery in the United States*, (New York: S. Hoyt & Co., 1831-32), 14.

⁷⁵⁵ Garrison, *Address Delivered in Boston... 1833*, 19-20.

⁷⁵⁶ *Anti-Slavery Reporter* 1:5 (1833), 74.

Independence.” How could it be, he asked, that “While the proud eagles of our country have been trumpeting long and loud the praises of liberty, a large portion of our fellow men enslaved and oppressed, have been toiling beneath the lash, in our very midst?”⁷⁵⁷ The meeting composed an “Address to the People of the United States” which challenged the people “Shall the United States, the free United States, which could not bear the bonds of a King, cradle the bondage which a King is abolishing? Shall a republic be less free than a monarchy?”⁷⁵⁸ Britain’s example confounded the abolitionists even as it energized them. Indeed the issue resulted in one of the few contentious debates in the early meetings of the abolitionist movement.

The New England meeting was roused from routine approval of resolutions condemning the variety of sins slavery birthed and commending the efforts of abolitionists to combat them, by the proposal of a resolution by Amasa Walker. Walker, a delegate from Boston, offered up a resolution:

“Resolved, That ‘THE LAND OF FREEDOM’ is a phrase inapplicable to the United States of America, and ought not to be used by any real friends of universal liberty until slavery be abolished.”⁷⁵⁹

Suggesting he was struck by the incongruity of its use at an abolitionist meeting, Walker said that the phrase “the land of freedom” seemed “a contradiction to the whole spirit and tenor of all we have done, and all we intended to do.”⁷⁶⁰ Conceding that the “The glorious land of liberty’ had long been the boast of our people,” Walker nonetheless demanded recognition of the fact “that we live in a land of Slavery, bitter, unalleviated Slavery.”⁷⁶¹ It was not merely that “the

⁷⁵⁷ *Proceedings ...New-England Anti-Slavery Convention...1834*, 7.

⁷⁵⁸ *Proceedings ...New-England Anti-Slavery Convention...1834*, 72.

⁷⁵⁹ *Proceedings ...New-England Anti-Slavery Convention...1834*, 11.

⁷⁶⁰ *Proceedings ...New-England Anti-Slavery Convention...1834*, 11.

⁷⁶¹ *Proceedings ...New-England Anti-Slavery Convention...1834*, 11.

land of freedom” erased the guilt of slavery that motivated Walker, but that the phrase worked to set the United States apart from other nations:

“In contradistinction to other civilized nations, we call ourselves a *free* people. We point across the Atlantic to the empires of Europe, and thank God that we are not like other men... But how empty, how vain, was this boast! Where shall we find slavery in its most aggravated and direful forms; in Europe or America?”⁷⁶²

Challenging his listeners to find “a despotism like ‘the despotism of freedom,’” Walker denied that amongst the “half-starved peasantry of Ireland... The serfs of [Russia]... the subjects of the Grand Seignor himself, do we find human degradation so complete and awful” as that of the American slave.⁷⁶³ “Let us” said the delegate, “frankly and honestly confess that we live... in a land where the right of freedom depends upon the complexion of the skin.”⁷⁶⁴ The phrase was not merely unjust and improper, he asserted, but actively worked to “paralyze the public mind to the subject of slavery.”⁷⁶⁵

“It was a self deception; it was a concealment of a great and glaring fact; it tended to sear the consciences of men, and create a self complacency altogether unwarranted by the true state of the case.”⁷⁶⁶

“Let us no talk about ‘*Southern Slavery*’ and ‘*American Freedom*’... but let the astounding conviction come home to our hearts, that, as a nation, we are polluted.”⁷⁶⁷ Walker urged the assembled delegates to “confess that, as a nation, we are disgraced.”⁷⁶⁸

Walker’s jeremiad was too much for some of the delegates. Perhaps unwilling to accept that America’s exceptionalism was now grounded in its slavery rather than its liberty, Rev.

⁷⁶² *Proceedings ...New-England Anti-Slavery Convention...1834*, 11-12.

⁷⁶³ *Proceedings ...New-England Anti-Slavery Convention...1834*, 12.

⁷⁶⁴ *Proceedings ...New-England Anti-Slavery Convention...1834*, 12.

⁷⁶⁵ *Proceedings ...New-England Anti-Slavery Convention...1834*, 12.

⁷⁶⁶ *Proceedings ...New-England Anti-Slavery Convention...1834*, 12.

⁷⁶⁷ *Proceedings ...New-England Anti-Slavery Convention...1834*, 12.

⁷⁶⁸ *Proceedings ...New-England Anti-Slavery Convention...1834*, 12.

Grosvenor objected to Walker's claim that freedom was dependent on skin color in the United States. Grosvenor pointed out that many slaves were as white or whiter than their masters. Quoting the Constitution's preamble, he argued that the mulatto children of slaveholders were as much the inheritors of the Constitution's guarantees of liberty as the white population.⁷⁶⁹ Emphasizing the commitment to securing liberty for posterity, Grosvenor seems to suggest that the United States' claim to be a land of freedom was rooted in its trajectory not current status. Taking another tact, Rev. Rand of Lowell sought to secure American title to the phrase through a more abstracted understanding of the words. Rand believed that Walker had "departed from the ordinary and general use of words."⁷⁷⁰ Rand asked "is not this a land of Literature and Religion, although perhaps a large majority of our people possess neither?"⁷⁷¹ It would, he believed, be "improper" to deny it was a land of freedom as a "very great majority... were in the enjoyment of freedom."⁷⁷² These arguments were pushed back against by C. C. Burleigh who pointed out that "slavery was upheld by the Laws of half the Union, and that the Constitution of the United States was general considered to sanction slavery."⁷⁷³ Possibly trying to diffuse the tension, William Oakes posited that in place of debating the United States as a land of freedom, the correct question was rather "whether this was a land of slavery."⁷⁷⁴ The debate was resolved by Garrison's intervention, and declaration that it was "not merely an abuse of language, but an outrage upon common sense; it was consummate hypocrisy and glaring falsehood, to call ours a *free* country."⁷⁷⁵ He "trusted the resolution would pass unanimously."⁷⁷⁶ It was adopted.

⁷⁶⁹ *Proceedings ...New-England Anti-Slavery Convention...1834*, 13.

⁷⁷⁰ *Proceedings ...New-England Anti-Slavery Convention...1834*, 13.

⁷⁷¹ *Proceedings ...New-England Anti-Slavery Convention...1834*, 13.

⁷⁷² *Proceedings ...New-England Anti-Slavery Convention...1834*, 13.

⁷⁷³ *Proceedings ...New-England Anti-Slavery Convention...1834*, 13.

⁷⁷⁴ *Proceedings ...New-England Anti-Slavery Convention...1834*, 13.

⁷⁷⁵ *Proceedings ...New-England Anti-Slavery Convention...1834*, 13.

The existence of this debate over the use of a particular cultural phrase could be understood as an example of the strident yet ultimately symbolic resolutions and denunciations often associated with marginal political movements. Yet, the resistance to the resolution, the attempts to gloss the tensions it aroused, and the intervention of Garrison and his expectation of unanimity suggest that the debate was reflective of the deep ill ease British colonial abolition triggered in abolitionist circles. More than a symbolic resolution, Walker's offering actually called forth a tense debate over the justice of using an abstract, albeit culturally significant, epithet. At its heart lay the fundamental question of what it was that the United States primarily symbolized, slavery or freedom. Grosvenor and Rand sought to hold fast to the heroic idea of American liberty while simultaneously rejecting a form of slavery now legally supported only in the United States, a compartmentalization disrupted by Walker's fervent denunciation. That Grosvenor turned to the promise of the Constitution to refute Walker's indictment is illuminating, highlighting a collapsing of America's self-defined moral mission with its constitutional document. Equally telling is Burleigh's rejection of Grosvenor's arguments on the very basis of the Constitution itself. Such a division was perhaps not unsurprising given the dual understanding of the Constitution held by the abolitionists.⁷⁷⁷ But the structuring of these arguments complicated the relationships between slavery and the Constitution seen above. Whereas more broadly, the questions were over the Constitution's capacity to support or destroy slavery as a political-economic system, here the issue was whether or not the Constitution's relationship to slavery made the latter American or unAmerican. Put another way, the Constitution was invested with the authority to sanctify or to cast out American cultural artifacts.

⁷⁷⁶ *Proceedings ...New-England Anti-Slavery Convention...1834*, 13.

⁷⁷⁷ In significant ways then, this early debate can be seen as initial indication of the conceptual divisions over the Constitution's relationship with slavery that would pit Garrison's complete rejection of the "agreement with Hell" against Gerrit Smith's and Frederick Douglass's textually derived anti-slavery constitution.

American and constitutional become, in this debate, synonymous. As the debate resolved itself on these grounds in favor of Walker's denunciation, it rendered slavery both constitutional and American. Nevertheless, it would be the second characteristic of slavery — its Americanness — that would be systematically developed by the abolitionist movement in the period immediately following.

The American-ness of slavery became a salient issue for abolitionists. The second annual report of the American Anti-Slavery in 1835 conceded that the continuation of slavery in the United States “makes our republic a laughing stock.”⁷⁷⁸ The report suggested public support as a reason for slavery's continuation:

“Here is the reason why slavery stands firm in Republican America. ... The appeal “Am I not a MAN and a *brother*?” is answered with a proud and contemptuous NO.”⁷⁷⁹

The unpalatable truth was that this situation could no longer be put down to institutional inertia, but was a reflection of the values that were acceptable to Americans. Not so much an anomaly to American culture, slavery was understood to exist as a central part of it. And more worryingly, it seemed to be coming more central not less. At the present trend, the Society pessimistically concluded, “there is a thousand-fold more probability that slavery will overthrow our republicanism than the reverse.”⁷⁸⁰

⁷⁷⁸ *Second Annual Report of the American Anti-Slavery Society; with the Speeches Delivered at the Anniversary Meeting, Held in the City of New-York, On the 12th May, 1835, and the Minutes of the Meetings of the Society for Business.* (New York: William S. Dorr, 1835), 60.

⁷⁷⁹ *Second Annual Report of the American Anti-Slavery Society...*, 39.

⁷⁸⁰ *Second Annual Report of the American Anti-Slavery Society...*, 60.

As this critique strengthened abolitionists came to see their object not in the removal of slavery from the United States, but in the defeat of the *American system* of slavery.⁷⁸¹ In 1832, the New-England Anti-Slavery Society had committed to “effect the abolition of slavery in the United States.”⁷⁸² Similarly the national Anti-Slavery Society was committed by its constitution to seek “the entire abolition of slavery in the United States.”⁷⁸³ But the address of the New York State Anti-Slavery society in 1835 “To the Citizens of the United States” aimed squarely at *American* slavery. Beginning with an observation that the United States had fallen short of its mission, the address pointed to the nation’s “two million and two hundred and fifty thousand slaves... mere property — good for nothing else than to gratify the passion and subserve the interest of any owner who may chance to hold them. *Such is the system of American Slavery.*”⁷⁸⁴ Narrating the historical development of the slavery in the Atlantic world, the address located American slavery as the apex of this development:

“At length, as the finishing stroke of the foulest policy which ever outraged heaven and disgraced the earth, the solemnity and authority of law were employed to protect and uphold an extensive and complicated scheme of theft, adultery and murder. THIS IS THE SCHEME OF AMERICAN SLAVERY.”⁷⁸⁵

Returning to the concept of an American system, the New York Society’s address “To the Friends of Immediate and Universal Emancipation” issued at the same time, committed the Society to never relax its “exertions till the system of American slavery is utterly, universally,

⁷⁸¹ To spell out this distinction, “slavery in the United States” communicates the existence of a politico-economic system of slaveholding within the territory of the United States. On the other hand the “American system of slavery” is a system of slaveholding that is both peculiar to the United States and constitutive of the American political and economic life. The shift in terms denotes a transfer of the “ownership” of slavery to the United States; America is not merely an example of slavery, but the author of unique form of slavery.

⁷⁸² *The Abolitionist* 1:1 (1833), 2.

⁷⁸³ *Constitution of the American Anti-Slavery Society*, (1833).

⁷⁸⁴ *Proceedings of the New York Anti-Slavery Convention, Held at Utica, October 21, and New York Anti-Slavery State Society, Held at Peterboro’, October 22, 1835*, (Utica, NY: Standard & Democrat Office, 1835), 23.

⁷⁸⁵ *Proceedings of the New York Anti-Slavery Convention... 1835*, 27.

and forever abolished.”⁷⁸⁶ Elsewhere, some new Anti-Slavery Societies similarly seemed to hint at a conception of their mission in terms of defeating “American Slavery” rather than the instances of slavery in the United States. In 1836 Ohio, the State Society tweaked the national grouping’s mission so as to commit themselves to “the entire abolition of Slavery throughout the United States,”⁷⁸⁷ Rhode Island anti-slavery activists were more explicit, organizing themselves “into a Society for the extirpation of American Slavery,”⁷⁸⁸ while next year the nascent Pennsylvanian abolitionists declared themselves “associated for the purpose of promoting the abolition of American slavery” and denounced “the slavery of the Southern states” as “a system of unparalleled oppression.”⁷⁸⁹ Meeting at Utica, NY in 1836, the New-York State Anti-Slavery Society would return to its earlier theme, addressing the abolitionists of the State to the effect that “American Slavery is a pyramid of crime,” and labeling the slave States

“the head quarters of cruelty for the world; the residence of duelling, the native land of Lynch law, where its professors reside and its scholars practice. These states are the asylum of piracy made respectable by the sanctions of law, where immortal minds are ruined, *in the wholesale*, by constitutional edicts... this is the Land of SLAVES.”⁷⁹⁰

In this way the “Americanization” of slavery brought with it its own perverse exceptionalism, in which the system of American slavery was both “superior” to and a locus for oppressive systems in the rest of the world. The American fall from grace was more complete and significant than

⁷⁸⁶ *Proceedings of the New York Anti-Slavery Convention... 1835*, 39.

⁷⁸⁷ *Narrative of the Late Riotous Proceedings Against the Liberty of the Press, in Cincinnati. With Remarks and Historical Notices, Relating to Emancipation*, (Cincinnati: Ohio Anti-Slavery Society, 1836), 8.

⁷⁸⁸ *Proceedings of the Rhode-Island Anti-Slavery Convention, Held in Providence, on the 2d, 3d, and 4th of February, 1836*, (Providence, RI: H. H. Brown, 1836), 7.

⁷⁸⁹ *Proceedings of the Pennsylvania Convention, Assembled to Organize A State Anti-Slavery Society, at Harrisburg, On the 31st of January and 1st, 2d and 3d of February 1837*, (Philadelphia: Merrihew and Gunn, 1837), 85, 87.

⁷⁹⁰ “Address to the Abolitionists of the State of New York,” *Proceedings of the First Annual Meeting of the New-York State Anti-Slavery Society, Convened at Utica, October 19, 1836*, (Utica, NY: New-York Anti-Slavery Society, 1836), 42, 44.

seen elsewhere because it remained, even in its uniquely sinful state, a city upon a hill. And this was enacted nowhere more explicitly than in the District of Columbia, the nation's capital.

The District as Sin

Nothing exercised abolitionists in the 1830s more than the continued existence of slavery in Washington D.C. The presence of slavery in the nation's capital stood as a tangible rebuke to the notion that the United States embodied the values of liberty and republicanism. Moreover, the District remained constitutionally under the direct control of Congress, negating the constitutionally ambiguous authority that the federal government and the northern States might have over slavery elsewhere. Slavery in the District of Columbia was therefore both symbolically significant and legally vulnerable to challenge. The abolitionists quickly grasped both characteristics and made its overturning a focus of their activism. Encouraging members to organize petitions, they hoped that the power of public opinion would sway Congress and ensure action.

The identification of slavery in the District of Columbia as an issue pre-dated the New-England and American Anti-Slavery Societies. In 1829 Charles Miner, a Representative from Pennsylvania, had asked that the House of Representatives consider a gradual plan of abolition in the District. Noting that "the Constitution has given to Congress, within the District of Columbia, the power of "exclusive legislation in all cases whatsoever,"" Miner pointed to the neglect that regulation of slavery in the capital had experienced since its creation.⁷⁹¹ Urging the ultimate

⁷⁹¹ *Speech of Mr. Miner, Of Pennsylvania, Delivered in the House of Representatives. on Tuesday and Wednesday, January 6 and 7, 1829, On the Subject of Slavery and the Slave Trade in the District of Columbia. With Notes*, (Washington DC: Giles & Seaton, 1829), 3.

removal of slavery from the District, Miner nonetheless showed little of the forthrightness and moral certainty of the Garrisonians. Framing his intervention as a necessary first step in addressing the “numerous corruptions” that had arisen and the opportunity to offer a corrective to the situation which “it is our duty to regulate by legislation,” Miner hoped the debate might be held “in a suitable temper, and with a proper deference for the opinions, and delicacy for the feelings, of those who entertain different sentiments.”⁷⁹² The House would accept resolutions seeking a review of slavery in the District of Columbia by the Committee on the District of Columbia and amendments to the laws as were deemed necessary (120 to 59) and an instruction to the Committee “to inquire into the expediency of providing by law for the gradual abolition of slavery within the District, in such a manner that the interests of no individual shall be injured thereby” (114 to 66).⁷⁹³ Miner’s extensive preamble detailing the corruptions which the reviews sought to address and noting the constitutional power of Congress to act against them was struck down with 37 votes in favor and 141 opposed.⁷⁹⁴

Once formed the new Anti-Slavery Societies made abolition in the District of Columbia their immediate aim and petitioning the means by which to achieve it. At the convention to form the National Anti-Slavery Society in 1833, Benjamin Lundy offered a resolution that the assembled members “exert themselves to urge forward, without delay, the petition of Congress for the abolition of Slavery in the District of Columbia...”⁷⁹⁵ By this point the groundwork for such a campaign had already been laid. The Annual Report of the New-England Anti-Slavery

⁷⁹² *Speech of Mr. Miner...*, 5.

⁷⁹³ *Register of Debates*, 20th Congress, 2nd Session, (Washington DC: Giles & Seaton, 1829), 192; *Speech of Mr. Miner...*, 4. The commitment to gradual abolition and the provision that no interests should be injured made this resolution far less radical in reality than the apparent willingness to countenance an end to slavery suggests.

⁷⁹⁴ *Register of Debates*, 20th Congress, 2nd Session, 192.

⁷⁹⁵ *The Abolitionist* 1:12 (1833), 184.

Society at the start of that year had claimed that “so long as slaves are held in the District of Columbia and in the Territories of the United States... it never can be true that the people of New-England are not bound to overthrow slavery in the United States.”⁷⁹⁶ The September 1833 edition of *The Abolitionist* provided a didactic dialogue between a member of the Colonization Society and an Abolitionist in which the willingness to challenge slavery in the District was a key point of difference.⁷⁹⁷ The same issue provided an example petition on the topic.⁷⁹⁸ The next month the magazine contained a feature on “Slavery and the Slave Trade in the District of Columbia” which noted “there is one part of the country where slavery is allowed, in regard to which the citizens of the north have not only a right to indicate and complain of the evil, but a great duty to perform of active exertion for its suppression.”⁷⁹⁹ The reproduction of John Whittier’s essay in the September *Anti-Slavery Reporter* conveyed that the “friends of emancipation would urge in the first instance an Immediate Abolition of Slavery in the District of Columbia, and in the Territories of Florida and Arkansas.”⁸⁰⁰

Targeting slavery in the District enabled abolitionists to side-step the question of the constitutional power to abolish slavery in the southern States. Whittier’s essay had, like Miner’s preamble, claimed that “The power to emancipate [slaves in the District] is clear. It is indisputable.”⁸⁰¹ The nation’s capital was a location where the relationship between the Constitution’s spirit and text need not be problematized as the text was unequivocal on congressional authority. As such the abolitionists could demand change in the District without inviting accusations that they sought unconstitutional goals. The distinction between the District

⁷⁹⁶ *The Abolitionist* 1:3 (1833), 35.

⁷⁹⁷ *The Abolitionist* 1:9 (1833), 133.

⁷⁹⁸ *The Abolitionist* 1:9 (1833), 139-140.

⁷⁹⁹ *The Abolitionist* 1:10 (1833), 145.

⁸⁰⁰ *Anti-Slavery Reporter* 1:4 (1833), 55.

⁸⁰¹ *Anti-Slavery Reporter* 1:4 (1833), 55.

and elsewhere was emphasized in their literature. “And if any defender of slavery... should start up and say, that this is out of the question... let him know... that meanwhile each State has even now the legal title in its jurisdiction; ...that the general government has already the right in its own territory of Columbia.”⁸⁰² The National Society’s *Declaration* conceded “that Congress, *under the present national compact*, has no right to interfere with any of the slave States...But we maintain that Congress has a right, and is solemnly bound... to abolish slavery in those portions of our territory which the Constitution has placed under its exclusive jurisdiction.”⁸⁰³ The distinction worked, abolitionists believed, to guard them against the charge that they were departing from the constitutional settlement inherited from the founders. In her *Anti-Slavery Catechism*, Lydia Maria Francis Child partly addressed the objection “...they say your measures are unconstitutional” with the assertion that “Nobody disputes that Congress has constitutional power to abolish slavery and the slave trade in the District of Columbia.”⁸⁰⁴ In its September 1833 dialogue, *The Abolitionist*’s Colonizationist claimed, “An amendment of the Constitution is out of the question, against the will of the slaveholding states.” His abolitionist opponent countered, “...there is another consideration. Congress have the sole and absolute regulation of the District of Columbia.”⁸⁰⁵ Congressional control over the District gave abolitionists a legitimate grievance and basis for arguing that slavery was not a southern concern but a matter of “national cognizance.”⁸⁰⁶ Indeed, the abolitionists mobilized the very constitutional jurisdiction of Congress over Washington as a positive inducement for action. The “Third Annual Report” of the American Anti-Slavery Society protested that “Never while that Constitution exists, can any voter for a congressman do his duty otherwise than by throwing his vote where it will tell most

⁸⁰² *Anti-Slavery Reporter* 1:1 (1833), 13.

⁸⁰³ *The Abolitionist* 1:12 (1833), 179.

⁸⁰⁴ Lydia Maria Francis Child, *Anti-Slavery Catechism*, (Newburyport: Charles Whipper, 1836), 33.

⁸⁰⁵ *The Abolitionist* 1:9 (1833), 133.

⁸⁰⁶ *The Abolitionist* 1:9 (1833), 133.

for the abolition in that District.”⁸⁰⁷ The particularly authority of Congress in the District made northern abolition agitation not a choice but a duty.

The peculiar legal situation of the District sat alongside its importance as a symbol of slavery in the United States. The continuation of the institution in the nation’s capital fed into the sense of slavery’s Americanness and undercut attempts to frame the United States as a moral entity. Washington’s harboring of slavery was seen as a national disgrace within abolitionist circles. “How much longer shall the soil of the District of Columbia be watered with the tears and fattened with the blood of Americans?” asked the Vermont Anti-Slavery Society in 1835.⁸⁰⁸ Not only was Washington D.C. allowing slavery to continue within its confines, it was also understood to be a hub within the domestic slave trade. On the floor of the House of Representatives in 1835, David Dickinson condemned the increase in the District’s slave trade, in which “Free blacks have been kidnapped, hurried out of the District, and sold for slaves.”⁸⁰⁹ Particularly objectionable was the use of the federal government’s prisons in the District to house slaves and the legal requirement of free Blacks to prove their freedom or face absorption into the slave population.⁸¹⁰ Effectively excluding citizens of the Union from visiting the capital, the abolitionists impugned the latter as violation of laws of God himself.⁸¹¹ The model petition of the New Hampshire abolitionists decried the existence in Washington of “a great market to which human flesh and blood are almost daily sent for sale...[,] the cruelties which accompany this traffic, the fetters which bind the Slaves, the whips with which they are driven, the auctions at

⁸⁰⁷ *Third Annual Report of the American Anti-Slavery Society; With the Speeches Delivered at the Anniversary Meeting, Held in the City of New-York, On the 10th May, 1836, and the Minutes of the Meetings of the Society for Business*, (New York: William S. Dorr, 1836), 83.

⁸⁰⁸ *First Annual Report of the Vermont Anti-Slavery Society...*, 12.

⁸⁰⁹ *Register of Debates*, 23rd Congress, 2nd Session, 1133.

⁸¹⁰ *Register of Debates*, 23rd Congress, 2nd Session, 1133, 1132.

⁸¹¹ *Register of Debates*, 23rd Congress, 2nd Session, 1133.

which they are sold.”⁸¹² That this slave market was operating in the capital, facilitated by the law and public institutions meant, argued the abolitionists, “We are therefore literally A SLAVE HOLDING NATION.”⁸¹³ It belied the American claim to be an asylum for mankind, and rendered the United States “the scorn and derision, rather than the boast of the earth.”⁸¹⁴ Convinced that few in the north did not at least share their disgust at slavery in the nation’s capital, the abolitionists hoped it would prove a galvanizing issue; “...if we cannot “guarantee to each of the States a republican form of government,” let us at least no longer legislate for a free nation within view of the falling whip, and within hearing of the execrations of the task-master, and the prayer of his slave!”⁸¹⁵ “To render this chosen land beloved by all, the pride and the glory of all,” said Dickinson “we must first render it lovely.”⁸¹⁶ Their petition campaign succeeded in getting the attention of Congress but not the anticipated result: at the beginning of the 24th Congress the House of Representatives initiated its infamous “gag rule,” under which such petitions were not discussed.⁸¹⁷

Despite the failure of the abolitionist movement to achieve the abolition of slavery in the District of Columbia, the pressure the campaign applied to Congress did have important consequences for understandings of the Constitution. The claims that the slave trade in the District dishonored the nation and could be abolished within the confines of the Constitution, forced the opponents of such a reform to articulate their reasons for resisting such a step. Here the blurring of what was American and what was constitutional, evinced in the abolitionist

⁸¹² *Proceedings of the N.H. Anti-Slavery Convention, Held in Concord, on the 11th & 12th of November, 1834*, (Concord, NH: Eastman, Webster & Co., 1834), 37.

⁸¹³ *Anti-Slavery Reporter* 1:5 (1833), 73.

⁸¹⁴ *Proceedings of the N.H. Anti-Slavery Convention...*, 31.

⁸¹⁵ *Anti-Slavery Reporter* 1:4 (1833), 56.

⁸¹⁶ *Register of Debates*, 23rd Congress, 2nd Session, 1140.

⁸¹⁷ For the House debates culminating the “gag rule” cf. *Congressional Globe*, 24th Congress, 1st Session, 27-49.

debates over the use of “the land of freedom,” became more pronounced. In the responses of slavery’s supporters to the challenge over slavery in the District, an understanding of the Constitution was formulated which posited a spirit that was holding on the text. Mirroring Grosvenor’s arguments in that earlier debate, these supporters of slavery suggested a constitutional ethos which was prior to the document itself and argued that the Constitution was itself the representation of a more fundamental “compact” which precluded abolition in Washington D.C.

The Compact and Public Faith

The emergence of immediate abolition as a political force in the 1830s came at the precise moment that southern fear over slave rebellion peaked. In Virginia the Southampton Insurrection (“Nat Turner’s Rebellion”) in 1831 had spread fear of slave uprisings and resulted in debates over the continuation of slavery that concluded in a more restrictive system.⁸¹⁸ Sensitive to the potential for unrest, Southerners saw in the abolitionist agitation incitement of slave revolt.⁸¹⁹ Pushing back against this perceived threat they sought to protect themselves from the abolitionists by whatever means were at their disposal. These included intimidation, the repression of free speech, overt violence, and an articulation of the Constitution that rejected the legitimacy of abolitionist “interference” in slavery. Arguing the constitutional text was the

⁸¹⁸ Insofar as an outcome of the insurrection was the illegality of teaching slaves to read and write, the timing of the abolitionist surge in the North might not be so coincidental. The high value placed on access to the Bible amongst New England Christians may have resulted in newly mobilized opposition to the religious repression deemed inherent to the lack of a capacity to read. Equally, the existence of an organized rebellion and the involvement of federal forces in its repression gave credence to abolitionist fears that they would be enlisted in future attempts to suppress rebellion.

⁸¹⁹ On southern fear of the abolitionist movement cf. John Ashworth, *Slavery, Capitalism, and Politics in the Antebellum Republic: Volume 1: Commerce and Compromise, 1820-1850*, (Cambridge: Cambridge University Press, 1995), 125-134.

expression of a more fundamental compact, they sought to gain acceptance for the notion that a “spirit of compromise” was as significant a part of their constitutional inheritance as the 1787 text itself. Although failing to secure a consensus that abolition of slavery in the District of Columbia was unconstitutional, they nevertheless created an understanding of the Constitution that both abolitionists and “dough-faces” would come to accept as the basis of debate.

Economic and ideological shifts meant that, by the 1830s, slavery in the South had firmer roots than had been the case during the Revolution. Economically, the closing of the (legal) foreign slave trade in 1808 had strengthened rather than weakened the institution. The bargain made over the slave trade at the Philadelphia Convention in 1787 had done little to curb slavery prior to 1808, and, as George William Van Cleve has shown, even to the extent that 1808 set a date for ending the slave trade it did so upon the understanding that slavery would be a sustainable institution by that point.⁸²⁰ By 1808 the number of slaves in the nation had increased by over 50% from the levels of the 1790s, and had expanded into the trans-Appalachian West.⁸²¹ By 1830 the slave population would have nearly doubled again.⁸²² Post-1808, the cotton boom and closing of the foreign trade meant slaves could demand higher prices at auction. With Europe pre-occupied with the Napoleonic Wars, the United States’ cotton industry and its importance began the significant growth that would make it a world-leader; In 1801 the United States accounted for 9% of the world’s cotton production, by the mid-century it would produce 68% of the world’s (now three times as large) annual product.⁸²³ The demand for labor created by this growth meant that after 1808 an internal slave trade flourished, and the Chesapeake

⁸²⁰ George William Van Cleve, *A Slaveholders’ Union: Slavery, Politics, and the Constitution in the Early American Republic*, (Chicago: The University of Chicago Press, 2011), 144-153.

⁸²¹ Van Cleve, *A Slaveholders’ Union*, 189.

⁸²² Robert Evans, Jr., “The Economics of American Negro Slavery, 1830-1860.” In *Aspects of Labor Economics*, (Princeton: Princeton University Press, 1962), 186.

⁸²³ Walker, *What Hath God Wrought*, 128.

region would increasingly see itself as engaged in the production of slaves for export to the West alongside the direct exploitation of their labor.⁸²⁴ Where a prime field hand traded for \$400-500 in 1814, a similar individual would be worth \$800-1100 in 1819.⁸²⁵ While prices decreased from this peak, by 1830 the range was \$425-800 and rose in the first years of the 1830s such that by 1837 they surpassed 1819.⁸²⁶ Crucially for the new arrangement of the slave system, slaves in New Orleans were valued at twice the price of those in Virginia.⁸²⁷ The increased importance of cotton, the growth of the slave population, the internal trade, and the greater value of the slaves themselves resulted in a greatly increased economic attachment to slavery in the mid-Antebellum South.

Parallel to the entrenchment of slavery economically came a more forthright ideological justification for the practice. Daniel Walker Howe notes that during the Missouri debates only a “few of the participants actually defended slavery as a positive moral good.”⁸²⁸ In the southern reactions to the abolitionists in the 1830s though, elements of the arguments that John Henry Hammond and Alexander Stephens would put forward in the later Antebellum period can be seen. At a public meeting in South Carolina, Edmund Bellinger would contend that “*Slavery is a blessing*” when individuals were, “from *natural* and *permanent* causes,” unable to enjoy liberty.⁸²⁹ Arguing that the laws were established for the greatest good of the greatest number, Bellinger suggested, “to the Southern slave, food, clothing and protection are *ample equivalents*

⁸²⁴ Walker, *What Hath God Wrought*, 148. For this reason the maintenance of a West open to slavery became a vital economic interest of the Chesapeake states during the Missouri Crisis.

⁸²⁵ Walker, *What Hath God Wrought*, 148.

⁸²⁶ Evans, “The Economics of American Negro Slavery, 1830-1860,” 199.

⁸²⁷ Evans, “The Economics of American Negro Slavery, 1830-1860,” 199.

⁸²⁸ Walker, *What Hath God Wrought*, 149.

⁸²⁹ Edmund Bellinger, Jr, *A Speech on the Subject of Slavery: Delivered 7th Sept’r., 1835. At a Public Meeting of The Citizens of Barnwell District, South-Carolina*, (Charleston, SC: Dan. J. Dowling, 1835), 23.

for the loss of freedom,” and, moreover, supported by the Bible.⁸³⁰ In Richmond, VA, Charles Farley would posit, “no man on earth can demand the enjoyment of his natural rights any farther than is consistent with his own well being and the well being of society.”⁸³¹ The abolitionists started with a justifiable view that “slavery in the abstract is a great evil,” Farley suggested, “But they reason falsely upon the principle... that slavery is, under any and all circumstances... a sin against God, and a sin against man.”⁸³² Farley disputed the notion of a natural right to liberty amongst slaves, instead offering the view that the “natural right of the slave is to kind treatment, and to every privilege consisting with the safety and happiness of the social system with which he is connected.”⁸³³ Under the heading “The Crisis,” the *Charleston Courier* declared that “we hold Slavery to be neither a sin nor a curse, but on the contrary, as an ordinance of Providence for our good, and as practical blessing... we would not abolish if we could... [slavery] in all probability, will be perpetual among us.”⁸³⁴ The northern sympathizer, John Denny, drew parallels between the United States and Athenian democracy and denied the citizenship of the Black population. Rejecting the ideal of racial equality, Denny concluded that “We compassionate [sic] the situation of the coloured man amongst us, but we are well convinced that it must ever continue to be, under this government, one of political and civil inferiority.”⁸³⁵ More ideologically and economically entrenched, slavery’s supporters were not receptive to the abolitionist’s pressure to reform. Instead, in their heightened state of anxiety, they saw abolition in the District of Columbia as the first step in universal emancipation; “Give them this District as

⁸³⁰ Bellinger, *A Speech on the Subject of Slavery...*, 23.

⁸³¹ Charles A. Farley, *Slavery; A Discourse Delivered in the Unitarian Church, Richmond, Va. Sunday, August 30, 1835*, (Richmond, VA: James C. Walker, 1835), 14.

⁸³² Farley, *Slavery; A Discourse...*, 6.

⁸³³ Farley, *Slavery; A Discourse...*, 14.

⁸³⁴ “The Crisis,” *Charleston Courier*, 14th November 1835.

⁸³⁵ John F. Denny, *An Enquiry into The political grade of the Free Coloured Population, under the Constitution of the United States, and the Constitution of Pennsylvania: In three parts*, (J. Pritts, 1834), 20.

a lever, and they will never cease until they bring this Government to act upon the States.”⁸³⁶

Looking to cut off discussion of abolition in the District and elsewhere, the advocates of slavery sought to demonstrate the unconstitutionality of abolition itself.

Aimed as much at foreclosing abolitionist discussion of slavery as at the articulation of a positive understanding of the Constitution, anti-abolitionists in the 1830s offered a vision of a constitutional “Compact” as their inheritance from 1787-88. This “Compact” comprised of a vision of the Constitution in which the commitment of the framers to compromise was integral. The compact theory of the 1830s was marked in difference from the compact theory of earlier periods. This later version sought not to comprehend the Constitution as the product of thirteen sovereign state entities combining, but rather as the embodiment of the spirit of compromise that enabled them to come together. Whereas the state sovereignty version of a compact had been tentatively offered since the founding — including, as we have seen, as a basis for seeking prior amendment during ratification itself, and in the Virginia and Kentucky Resolutions — the version of the 1830s did not mobilize the compact as a basis for nullification, secession, or resistance to concrete policies, but rather to deny the legitimacy of even discussing issues deemed fundamental to the Union. Outlining the effect of this argument in 1836, abolitionist Rev. Samuel J. May offered a sketch of the Compact:

“Whenever the Abolitionist goes to plead the cause of our enslaved countrymen, he is met with the objection very confidently urged in bar of his proceeding, that an arrangement was made in the Constitution of this confederacy, by which the people of the non-slaveholding States are bound not to attempt in any way the overthrow of Slavery. The alleged compact, it is urged, obliged our predecessors, who were the first parties to it, and obliges us, who have succeeded to the blessings of the “glorious union” they effected on this condition, silently to

⁸³⁶ Henry Laurens Pinckney speaking the House of Representatives 8th February 1836. *Register of Debates*, 24th Congress, 1st Session, 2494.

acquiesce in the continuance of that accursed system of physical oppression, civil degradation and soul-murder; nay more, to co-operate actively to enforce it, if at any time our Southern brethren may need our assistance.”⁸³⁷

As May suggests, the aim of the compact theory was not merely to deny the constitutionality of schemes of abolition, but also to deny the constitutionality of even discussing them. It rested on an understanding that America’s constitutional inheritance lay not in the constitutional text alone, but the penumbral agreements that made the text possible. The attempt to reassess those compromises, and even to problematize the idea of compromise, was then as much a strike against the Constitution as any unconstitutional legislation.

For anti-abolitionists, all that was needed to ensure a return to national harmony was recognition by the abolitionists of the truth of this compact. Anti-abolitionists in Portland, Maine noted that the “The constitution of the United States it is well known, was the result of compromise,” and resolved that “the Union must be preserved; and that the principles and spirit of the fundamental compact... must be maintained holy and inviolate.”⁸³⁸ The *Richmond Whig* declaimed the persistent agitation of abolitionists that was “destroying the compromise of the constitution.”⁸³⁹ By the mid- to late-1830s this mode of argumentation was widespread to the point of abolitionist exasperation. Abolitionist N. P. Rogers would lament by 1837 that one “cannot advance in direction of the castle of this pet-monster of the republic — slavery... but your ears are assailed from every quarter with cries of, “Compact” - “Pledges to our Southern brethren” - “Guaranty of their peculiar institutions” - “The great compromise.”⁸⁴⁰ Rhode Island abolitionists complained in their “Report on the Constitution” that ““We abide by our compact”

⁸³⁷ “Slavery and the Constitution,” *The Quarterly Anti-Slavery Magazine* 2:1 (1836), 73.

⁸³⁸ *The proceedings of a Meeting Held in Portland, ME. August 15, 1835, By the Friends of the Union and the Constitution, on the Subject of Interfering at the North and East with the relations of Master and Slave at the South*, (Portland, ME: 1835), 3, 6.

⁸³⁹ Reprinted in the *Washington Globe*, 2nd February 1836.

⁸⁴⁰ “The Constitution,” *The Quarterly Anti-Slavery Magazine* 2:6 (1837), 145.

is the motto of the Pro-slavery party at the North, and "you are violating your fathers' compact," is the charge made against us in the South."”⁸⁴¹

A key benefit of this compact theory for the opponents of abolition in the 1830s lay in its ability to counter the argument that Congress possessed legislative authority over slavery in the District of Columbia. The theory was provided with its most systematic and pointed expression on this issue by Henry Laurens Pinckney's *Report... Upon the Subject of Slavery in the District of Columbia*.⁸⁴² Pinckney, seeking to put to bed forever the issue of abolition in the District, provided an elaborate essay in order to justify non-interference in the District despite the overt textual authority of Congress with regard to slavery in Washington. Instructed by Congress to produce a report showing that interference in slavery in the States would be unconstitutional and the same in the District of Columbia would be "a violation of public faith, unwise, impolitic, and dangerous to Union,"⁸⁴³ Pinckney set out to show that "a violation of the public faith" was "substantially tantamount to a positive declaration that the interference alluded to would be *unconstitutional*."⁸⁴⁴ Dealing initially with the unconstitutionality of interference in the States, Pinckney demonstrated that the practice of forty years had seen the States exercise authority in this area. Rounding off his account, the *Report* summarized

"... may we not hope, and indeed conclude, that it will be hereafter deemed a solemn and deliberate exposition of the constitution, and that all attempts in future to violate those sacred compromises, which lie at the very foundation of our

⁸⁴¹ *Proceedings of the Rhode-Island Anti-Slavery Convention... 1836*, 70.

⁸⁴² *Report of the Select Committee Upon the Subject of Slavery in the District of Columbia, Made by Hon. H. L. Pinckney, to the House of Representatives, May 18, 1836. To Which is appended the votes in the House of Representatives upon the several resolution with which the Report concludes*, (Washington, DC: Blair and Rives, 1836).

⁸⁴³ *Report of the Select Committee Upon the Subject of Slavery in the District of Columbia...*, 3.

⁸⁴⁴ Henry Laurens Pinckney, *Address to the Electors of Charleston District, South Carolina, on the Subject of the Abolition of Slavery*, (Washington, DC, 1836), 7.

constitutional compact, or to excite apprehension on this subject, will be effectually counteracted and defeated.”⁸⁴⁵

Turning to the issue of slavery in the District of Columbia, Pinckney hoped to harness the authority of those sacred compromises to shield Washington’s slaveholders from regulation. Rejecting the notion that the legislative authority of Congress was relevant to this discussion, Pinckney instead sought to deny Congress’s authority over slaves in the District by demonstrating that such a power was never considered as part of the compromise entered into by Maryland and Virginia. The powers of Congress over the District were, he said, “derived from a source entirely separate from the general legislative powers granted to Congress by the constitution.”⁸⁴⁶ Congressional authority over the District instead existed in order to secure the federal capital from the outside interference of the State governments. As the regulation of slavery did not involve such considerations, it would be deemed a violation of the public faith to interfere with slavery in a manner at odds with its treatment had the District remained within the borders of Virginia and Maryland. Cession of the District, read the *Report*,

“was designed by the framers of the constitution, to enure to the benefit of the whole confederacy, and was made in the furtherance of that design; and if Congress, contrary to the obvious intent and spirit of the cession, shall do an act not required by the national objects, contemplated by it, but directly repugnant to the interests and wishes of the citizens of the ceded territory, and calculated to disturb the peace, and endanger the interests, of the slaveholding members of the Union, such an act must be in violation of the public faith,”⁸⁴⁷

In such a way, Pinckney could argue that interference in the District was out-with the powers of Congress despite the textual authority of the Constitution. But this did not show that exercise of such powers would be in any sense *unconstitutional*. To achieve this, Pinckney articulated the

⁸⁴⁵ *Report of the Select Committee Upon the Subject of Slavery in the District of Columbia...*, 5.

⁸⁴⁶ *Report of the Select Committee Upon the Subject of Slavery in the District of Columbia...*, 5.

⁸⁴⁷ *Report of the Select Committee Upon the Subject of Slavery in the District of Columbia...*, 9.

view that something existed with greater authority than the textual constitution itself — the principles which the Constitution embodied:

“The constitution, while it confers upon Congress exclusive legislation *within* this District, does not, and could not, confer unlimited or despotic authority over it. It could confer no power contrary to the fundamental principles of the constitution itself, and the essential and unalienable rights of American citizens.”⁸⁴⁸

Driving his point home, Pinckney offered the view that a violation of the public faith was significantly more destabilizing than any act that was merely unconstitutional. A violation of the spirit of commitments surrounding the Constitution would undermine the very possibility of constitutional government and as such was more fundamental than any particular constitutional text:

“Why are treaties regarded as sacred and inviolable? Why, but because they involve the pledge, and depend upon the sanctity of the national faith? Why are all compacts or promises made by Governments held to be irrevocably binding? Why, but because they cannot break them without committing perfidy, and destroying all confidence in their justice and integrity?”⁸⁴⁹

As the great object of the Constitution had been to form a more perfect union, as the District had been ceded to enable this - without the intention of surrendering powers over slavery to the federal government, - and as the statesmen of the time (and since) had never considered the situation to be other than this, the committee regarded the understanding and intent of cession as holding over any constitutional text which could be interpreted to undermine this. Reaching beyond the committee’s charge the *Report* asserted that it had “no hesitation to say, that, in the view they [the committee] have taken of the whole question, the obligations of Congress not to act on this subject are as fully binding and insuperable as a positive constitutional interdict, or an

⁸⁴⁸ *Report of the Select Committee Upon the Subject of Slavery in the District of Columbia...*, 10.

⁸⁴⁹ *Report of the Select Committee Upon the Subject of Slavery in the District of Columbia...*, 11.

open acknowledgement of want of power.”⁸⁵⁰ Which was to say, that the spirit of the Constitution was a stronger constraint than its words.

Pinckney’s assertion that interference in the District was a violation of public faith was not enough for the electors of South Carolina. Pinckney found himself defending his actions in the lead up to a election in 1836 which ultimately saw him deselected.⁸⁵¹ But South Carolina was, as was typical during this period, more radical than much of the country. Elsewhere, Pinckney’s articulation of a compact chimed with the views of abolition’s opponents. In the heartland of abolition, the Governor of Massachusetts called on the houses of the legislature “to imitate the example of our fathers” and exhibit “the principle of forbearance and toleration” on the subject of slavery.⁸⁵² “This compact recognizes the existence of slavery” he instructed them, “...Every thing that tends to disturb the relations created by this compact is at war with its spirit.”⁸⁵³ In the context of discussing abolitionism, New York Governor Marcy informed the Legislature of that States that “The people of this State continue to cherish an unabated attachment to the federal compact.”⁸⁵⁴ This attachment bound “them to a course of fraternal conduct towards their sister States,” including “the highest and most sacred obligations... it imposes on them, and to abstain from all practices incompatible with these duties, or contrary to the spirit of any of its provisions.”⁸⁵⁵ Collating opinions on the issue from around the country, Marcy transmitted to the State Legislature similar sentiments from other States. The Governor of

⁸⁵⁰ *Report of the Select Committee Upon the Subject of Slavery in the District of Columbia...*, 14.

⁸⁵¹ Pinckney, *Address to the Electors of Charleston District...* . Pinckney’s support held up in the City of Charleston but beyond the parishes of St. Philip and St. Michael he garnered only 39 out of 351 cast votes. *The Southern Patriot*, 14th October 1836.

⁸⁵² Edward Everett, *Address of His Excellency to the Two Branches of the Legislature on the Organization of the Government, for the Political Year Commencing January 6, 1836*, (Boston: Dutton and Wentworth, 1836), 30.

⁸⁵³ Everett, *Address...to the Two Branches...*, 29-30.

⁸⁵⁴ *Message from the Governor, To the Senate and Assembly*, New York Senate Papers No. 1 (1836), 35.

⁸⁵⁵ *Message from the Governor, To the Senate and Assembly*, 35.

Maine approved the view that “The federal compact owed its origin to the spirit of deference, conciliation and mutual forbearance, which pervaded the then independent States.”⁸⁵⁶ The General Assembly of Kentucky condemned abolitionism as “a violation of the original basis of the federal compact,” and abolition in the District as “a breach of the implied faith of the nation.”⁸⁵⁷ In Michigan, the Legislature resolved that “the formation of [abolitionist] societies... [is] in direct violation of the obligations of the compact of our Union, and destructive to the tranquility and welfare of the country.”⁸⁵⁸ Virginia asserted the right to expect her sister States to suppress abolitionist activity that was “in defiance of the obligations of social duty and those of the Constitution.”⁸⁵⁹ This right was, Virginia claimed founded in international law, and “peculiarly fortified by a just consideration of the intimate and sacred relations that exist between the States of this Union.”⁸⁶⁰ In case the subtext was overlooked, the Legislature also resolved “That Congress has no constitutional power to abolish slavery in the district of Columbia, or in the territories of the United States.”⁸⁶¹ North Carolina similarly denounced interference in Washington, D.C.’s slavery as “a breach of faith.”⁸⁶²

As these extracts, and the explanation of May offered above, suggest, the compact theory rested on the notion that there was continuity in the nature of constitutional compromise. That is

⁸⁵⁶ *Communication from the Governor, transmitting a report and resolutions adopted by the Legislature of the state of Maine, relative to the subject of slavery*, New York Senate Papers No. 85 (1836), 3.

⁸⁵⁷ *Communication From the Governor, transmitting resolutions from the Legislature of Kentucky on the subject of abolition societies*, New York Senate Papers No. 79 (1836), 5.

⁸⁵⁸ *Communication From the Governor, transmitting a preamble and resolutions of the Legislature of Michigan, in relation to slavery*, New York Senate Papers No. 77 (1836), 4.

⁸⁵⁹ *Communication From the Governor, transmitting a copy of certain resolutions of the General Assembly of the State of Virginia*, New York Assembly Papers No. 246 (1836), 3.

⁸⁶⁰ *Communication From the Governor, transmitting... resolutions of the General Assembly of the State of Virginia*, 3.

⁸⁶¹ *Communication From the Governor, transmitting... resolutions of the General Assembly of the State of Virginia*, 5.

⁸⁶² *Message From the Governor, transmitting a Preamble and Resolutions from the Legislature of North-Carolina*, New York Assembly Papers No. 22 (1836), 4.

to say, that attempts to problematize slavery were, as breaches of the “original” basis of the Constitution, as illegitimate in 1836 as they would have been in 1789. It is also crucially the case that the compact existed as much, if not more so, in spirit as it did on actual paper. For Pinckney and his fellow travelers, the Constitution was not the product of negotiation and horse-trading but an artifact of a mode of engagement - a spirit - that actualized the Preamble’s commitment to form a more perfect union. This focus upon the spirit necessarily shifted the locus of constitutionality away from the impersonal and timeless written text and to the spirit of the individuals and time in which it was brought into being. As such it incorporated not merely agreements directly expressed in the text, but the understandings that surrounded the Philadelphia Convention’s final product. This view, in the words of the citizens of Albany, avowed:

“That the constitution of the United States carries with it an adjustment of all questions involved in the deliberations which led to its adoption, and that the compromise of interests in which it was founded, is binding in honor and good faith, *independently of the force of agreement*, on all who live under its protection and participate in the benefits of which it is the source.”⁸⁶³

With regard to the issue of slavery in the District of Columbia this shift was entirely the point, undermining the clear textually derived authority of Congress in this area and prioritizing the spirit of the Constitution.⁸⁶⁴ Noting this shift, *The Anti-Slavery Examiner* asked how now constitutionality was to be assessed; “Is it by those glorious charters you have inherited from your fathers...? Alas! Another standard has been devised.”⁸⁶⁵ Deploing the indeterminacy created by this compact, it stated that “This compact is not indeed published to the world,” but

⁸⁶³ Quoted in *Opinions of Martin Van Buren Vice President of the United States, Upon the Powers and Duties of Congress, in Reference to the Abolition of Slavery Either in the Slaveholding States or in the District of Columbia. To which are added sundry documents showing his sentiments upon other subjects*, (Washington, DC: Blair & Rives, 1836), 4-5.

⁸⁶⁴ Of course, this was itself just one “reading” of the spirit of the Constitution.

⁸⁶⁵ *The Anti-Slavery Examiner* 1:1 (1836), 1.

was defined only by the acts which anti-abolitionists deemed unacceptable. The compact theory did indeed represent a break with textual understandings of the Constitution. It raised, and defined as extra-textual compromise, the spirit of the Constitution at the expense of the text. In the final analysis, it worked to make the intentions and commitments of the framers as exhibited at Philadelphia the very substance of the “Constitution” itself.

Constitutional Faiths

As the assertions of the citizens of Albany signal, the compact theory had influence beyond hardened defenders of slavery. The dough-face politicians of the North were equally willing to embrace its logic as a method by which to structure a Democratic party with support in both sections. As the tension over slavery in DC grew in the 1830s, it emerged as an important issue within the 1836 presidential election. Martin Van Buren, aiming to create a durable national party tentatively embraced the doctrine as a method of placating supporters in both regions. Abolitionists also altered their own arguments in order to address the charges of their critics, and in doing so adopted some of the fundamental assumptions of the theory. The result was a constitutional discourse in which the intentions and motivations of the framers and founders became the point of discussion.

Van Buren sought to establish himself as candidate that the South could trust in 1836. His earlier support for the restriction of slavery during the Missouri crisis made him suspect to southern eyes. A northerner who had courted Rufus King, the “leader of Northern restriction forces” in those earlier debates, distrust of Van Buren was only heightened by his endorsement

by the pro-abolition *Oneida Standard and Democrat*.⁸⁶⁶ Exemplifying such distrust, “A Voter” asked the readers of the *Alexandria Gazette* “can you believe that that man who... denied to a Territory the privileges of the Union, unless upon making the abolition of slavery therein an indispensable requisition, a Jeffersonian Republican?”⁸⁶⁷ Contemporary critics of Van Buren charged that he pursued the issue of slavery in the District of Columbia as a method by which to prove his loyalty to the South.⁸⁶⁸ Whether contrived or not, Van Buren certainly effectively abandoned his declared opposition to slavery in order to appease southern critics.⁸⁶⁹ The *Annual Report* of the Massachusetts Anti-Slavery Society noted Van Buren’s efforts to “demonstrate [his] respect for southern interests, by the most vehement condemnation of the Abolitionists.”⁸⁷⁰ He instigated the rejection of abolitionist literature by the Postmaster of New York City, encouraged Governor Marcy of New York to use his New Year message to condemn abolition (see above), and supported the gag rule in Congress.⁸⁷¹ New York Democrats worked hard to make it clear that they did not endorse abolitionism. Congressman Samuel Beardsley led at mob

⁸⁶⁶ Van Cleve, *A Slaveholders’ Union*, 253. Donald Cole, *Martin Van Buren and the American Political System*, (Princeton: Princeton University Press, 1984), 271.

⁸⁶⁷ *Alexandria Gazette*, 4th November 1836.

⁸⁶⁸ *Inconsistency and Hypocrisy of Martin Van Buren on the Question of Slavery*, (1848), 5-8.

⁸⁶⁹ Van Buren would claim in later life that he was always an advocate of abolition. In 1848: ‘My opinion in favor of the power of Congress to abolish slavery in the District of Columbia, has been repeatedly avowed, as well when candidate as whilst President; and every day’s reflection has served to confirm my conviction of its correctness.’ Opponents of Van Buren often noted his willingness to shift with the political wind. “David Crockett” denounced him as “a federalist to-day, a republican to-morrow, and a hypocrite always.” “A Citizen of New York” wrote “His system of politics has been proverbially, non-committal. It has been a prominent trait in his policy, to float ostensibly with the majority, in favor of a measure, while his adherents have been found violently assailing it, and that too not only by his consent, but by his procurement.” *Inconsistency and Hypocrisy*, 15; David Crockett, *The Life of Martin Van Buren, Heir-Apparent to the “Government” and the Appointed Successor of General Andrew Jackson*, (Philadelphia: Robert Wright, 1837), 18; *Memoir of Martin Van Buren, Comprising an Account of the Intrigues by Which he Sought and Acquired the Nomination and Election to the Office of Chief Magistrate; Together with Developments of his Political Character, By a Citizen of New York*, (New York: R. W Roberts, 1838), 130-131.

⁸⁷⁰ *Fourth Annual Report of the Board of Managers of the Massachusetts AntiSlavery Society, With Some Account of the Annual Meeting, January 20, 1836*, (Boston: Isaac Knapp, 1836), 21.

⁸⁷¹ Cole, *Martin Van Buren*, 271-272.

at the abolitionist meeting in Utica which saw the New York Anti-Slavery Society retreat to the town of Peterboro' and the destruction of the *Oneida Standard and Democrat* offices.⁸⁷² Abolitionists suspected Beardsley's subsequent appointment as State Attorney General was reward for his actions.⁸⁷³

Van Buren's most significant response to his perceived unreliability on the issue of slavery though, was the production of a pamphlet outlining his views on abolition in Washington. Borrowing liberally from accounts in the supportive *Richmond Enquirer*, the pamphlet stopped short of declaring the power of Congress to regulate slavery in the District unconstitutional, but nonetheless made a clear commitment to non-interference. Stating that the power over slavery in the District of Columbia was a "*casus omissus*"⁸⁷⁴ in the Constitution, Van Buren admitted the existence of congressional authority but denied the legitimacy of its use. An extract from the *Richmond Enquirer* explained; "Mr. Van Buren holds... that the abolition of slavery in the District, against the wishes of the slave-holding States, would destroy at once that compromise of interests *which lies at the basis of our social compact*." ⁸⁷⁵

"He therefore declares it to be his *clear and settled opinion*, that it is the sacred duty of those who are entrusted with control of the action of the Federal Government, to use their constitutional power so as to prevent it; and, of course, if he were the President of the United States, he must veto any bill which might affect the rights of the slave-holders in the District. No language indeed can be stronger than that which he employs. He would go into the Presidential chair "the *inflexible and uncompromising* opponent of any attempt on the part of Congress to abolish slavery in the District."⁸⁷⁶

⁸⁷² Cole, *Martin Van Buren*, 217.

⁸⁷³ *The Anti-Slavery Examiner* 1:1 (1836), 2.

⁸⁷⁴ An omitted case. *Opinions of Martin Van Buren...*, 3.

⁸⁷⁵ *Opinions of Martin Van Buren...*, 3.

⁸⁷⁶ *Opinions of Martin Van Buren...*, 3.

Providing further evidence for Van Buren's opposition to abolition in the District, the pamphlet offered the Vice President's letter to a group of gentlemen in North Carolina. In the letter, Van Buren referred to his "full concurrence" in the sentiments offered by the citizens of Albany.⁸⁷⁷ Responding to the question of slavery in Washington, DC, he reiterated a belief that Congress had legal authority but offered the following in addition:

"...whilst such are my impressions upon the abstract question of the legal power of Congress... I do not hesitate to give it to you as my deliberate and well considered opinion, that there are objections to the exercise of this power, against the wishes of the slave-holding States, *as imperative in their nature and obligations*, in regulating the conduct of public men, *as the most palpable want of constitutional power would be.*"⁸⁷⁸

Basing his assessment on criteria markedly similar to those offered by Pinckney in the latter's *Report*, Van Buren grounded his view in judgments, (i) that had abolitionist agitation been foreseen at the time of the Constitution's adoption an exemption for slavery in DC would have been written into the constitutional document, (ii) that had Maryland and Virginia foreseen the possibility of abolition they would not have ceded the District, and (iii) that abolition in the District would "violate the spirit of that compromise of interests which lies at the basis of our social compact."⁸⁷⁹ Essentially then, Van Buren argued that abolition in the District would contravene the intentions of those involved in the adoption of the Constitution and the cession of the District. After his election, Van Buren arrived at his inaugural speech in a carriage fashioned from wood taken from the U.S.S. Constitution, and reiterated his commitment to go into the "Presidential chair the inflexible and uncompromising opponent of every attempt on the part of Congress to abolish slavery in the District of Columbia against the wishes of the slaveholding

⁸⁷⁷ *Opinions of Martin Van Buren...*, 4.

⁸⁷⁸ *Opinions of Martin Van Buren...*, 5.

⁸⁷⁹ *Opinions of Martin Van Buren...*, 5-6.

States.”⁸⁸⁰ Justifying his position on the basis that his election provided a mandate for his views on the subject of abolition offered during the campaign, he added, “It now only remains to add that no bill conflicting with these views can ever receive my constitutional sanction. These opinions have been adopted in the firm belief that they are in accordance with the spirit that actuated the venerated fathers of the Republic, and that succeeding experience has proved them to be humane, patriotic, expedient, honorable, and just.”⁸⁸¹ In this way, the assumption of the compact theory that the spirit that actuated the framers remained binding was given presidential assent.

Abolitionists too adopted some of the logic of the compact, yielding two ideological strands of abolition that would fracture the movement in the 1840s.⁸⁸² Abolitionist attitudes towards the Constitution would ultimately polarize around the positions occupied by William Lloyd Garrison (covenant with death) and Gerrit Smith and Frederick Douglass (that the document contained no support for slavery). But this division would come later, predicated to a degree upon the publication of Madison’s notes taken during the Philadelphia Convention.⁸⁸³ In the mid-1830s, without extensive accounts of the Philadelphia Convention’s deliberations, abolitionists would argue that the continuation of slavery could not have been the intent of framers. Instead, rejecting the compact theory offered by slavery’s defenders, the abolitionists sought to show that abolition - or at least non-support of slavery - had been the intent of the framers. However, even as they rejected the “compact,” they did so on the grounds that moved

⁸⁸⁰ Martin Van Buren, “Inaugural Address (March 4, 1837),” 1837; Cole, *Martin Van Buren*, 289.

⁸⁸¹ Martin Van Buren, “Inaugural Address (March 4, 1837)”

⁸⁸² On this fracturing cf. Quarles, *Black Abolitionists*, 40-45.

⁸⁸³ On the importance of Madison’s papers for the abolitionist rejection of the Constitution cf. Paul Finkelman, “Garrison’s Constitution: The Covenant with Death and How It Was Made,” *Prologue* 32:4 (2000). For the most important rejection of the Constitution on this basis cf. Wendell Phillips, *The Constitution A Pro-Slavery Compact. Or Selections From the Madison Papers, &c.*, (New York: American Anti-Slavery Society, 1844).

beyond modes of strict construction and invoked the intentions and expectations of key founders. As such, they conceded that the intentions behind the Constitution were indeed the stakes of the constitutional argument. Such an argument can be seen in the response of Ohio abolitionists to the unrest in Cincinnati:

““Now if the institution of slavery was, by mutual compromise, to remain inviolate and immoveable, would these illustrious men, such as Jay, Franklin, Rush, Madison, and Gerry, have conducted in this manner? Could a compact like the one in question have been formed, without John Jay being informed of it?””⁸⁸⁴

Further offering Washington’s support for legislative abolition, the Ohio abolitionists argued that “From these facts, and from all the examination we have had it in our power to make, we have no hesitation in pronouncing the supposed “compact,” or “compromise,” to be a groundless fiction, and one, too, of no ordinary malignity.”⁸⁸⁵ The pro-slavery compact theory was “nothing less than a libel on the illustrious dead.”⁸⁸⁶ Abolitionists in Rhode Island “cheerfully declare[d], that their fathers’ principles, their fathers’ examples and their fathers’ compacts, are things sacred in their eyes,” but not superior to the Constitution itself.⁸⁸⁷ Nonetheless, they framed their broad mission as an “effort... to *regain the ground which liberty occupied in 1787*” and identified Franklin, Rush, and Jay as typifying the views of 1787 regarding slavery.⁸⁸⁸ And their understanding of the Constitution was rooted in intention:

“There is a manifest effort in the construction of sentences, to avoid every appearance of sanctioning the institution of slavery. ...We have but slight sketches of the debates in this Convention; but slight as they are, they confirm our inferences drawn from the Constitution.”⁸⁸⁹

⁸⁸⁴ *Narrative of the Late Riotous Proceedings...*, 6.

⁸⁸⁵ *Narrative of the Late Riotous Proceedings...*, 7.

⁸⁸⁶ *Narrative of the Late Riotous Proceedings...*, 6.

⁸⁸⁷ *Proceedings of the Rhode-Island Anti-Slavery Convention...* 1836, 71.

⁸⁸⁸ *Proceedings of the Rhode-Island Anti-Slavery Convention...* 1836, 29, 27.

⁸⁸⁹ *Proceedings of the Rhode-Island Anti-Slavery Convention...* 1836, 72.

Elsewhere, N. P. Rogers looked to the preamble “to gather some inklings of their [the framers] *intent*... some means of conjecturing their *purpose*,” and found the Constitution to be a “deed of universal liberty.”⁸⁹⁰

The relationship between the constitutional text and framer intent was given an extended consideration by the abolitionist Rev. Samuel J. May in the October 1836 issue of *The Anti-Slavery Magazine*. In the piece, entitled “Slavery and the Constitution,” May sought to meet the compact theory head on and disprove its claims. Setting his goal as a close consideration of the relationship between the Constitution and slavery, May believed that “We owe it to the memory of those venerated men whose names are conspicuous in the early history of our Republic, and who are accused of having entered into such an iniquitous agreement, to exonerate them, if we can, from the tremendous responsibility that is laid upon them by our opposers.”⁸⁹¹ If he could not, then they deserved to be “covered in infamy” - but any such judgment would need to take into account the constraints within which they had operated so as to “judge fairly of what the framers of the Constitution actually did with respect to slavery.”⁸⁹² Combing through the Constitution, May reconstructed what he believed to be the intention of the framers, and adjudged that “It is impossible not to perceive the pains which the framers of these articles took to avoid any explicit recognition of slavery.”⁸⁹³ Addressing the fugitive clause he rejected the widely held understanding in favor of one based on a judgment of intent; “... if a construction more honorable to our fathers, and more consonant with their avowed principles and intentions can be put upon it, we surely ought to prefer it.”⁸⁹⁴ He concluded with the opinion that “It seems

⁸⁹⁰ *The Quarterly Anti-Slavery Magazine* 2:6 (1837), 147.

⁸⁹¹ *The Quarterly Anti-Slavery Magazine* 2:1 (1836), 74.

⁸⁹² *The Quarterly Anti-Slavery Magazine* 2:1 (1836), 74, 75.

⁸⁹³ *The Quarterly Anti-Slavery Magazine* 2:1 (1836), 89.

⁸⁹⁴ *The Quarterly Anti-Slavery Magazine* 2:1 (1836), 86.

to us that the framers of our Constitution finding they had not the power to abolish slavery, were determined to do the next best thing – *not commit the national government to its support.*”⁸⁹⁵ Having examined the constitutional document with a view to recapturing the framers intent, May could regard it as a base from which to “subvert the foundations of that burning mountain of crime and misery, which throws its threatening shadows over our whole country.”⁸⁹⁶ He looked forward “with eager expectation” to the publication of Madison’s manuscript, which would surely confirm his reading of the convention’s intent and support such a conclusion.⁸⁹⁷

The compact theory then, had consequences beyond its immediate genesis as a method of countering abolitionist claims regarding slavery in the District of Columbia. Its extreme incarnation, which set the authority of a spirit of compromise above the constitutional text itself, was not readily embraced in the North by either Van Buren and his supporters or the abolitionists. But both groups nonetheless accepted the premises of that argument to a great extent. Van Buren adopted the view that the implicit agreements made around the constitutional document could be binding on future generations. The abolitionists accepted that the intentions of the Philadelphia Convention informed the correct meaning of the document. Both conceded the legitimacy of deploying the views of the collective or individual founders within contemporary constitutional debates. As much as these views were often projected, hypothetical, and ascribed rather than proven, their recognition within constitutional debates marked a shift from Gerry’s rejection of Madison’s personal recollections in 1791 or the hysterical fear of constitutional tinkering in the 1820s. In the debates surrounding slavery in the District of

⁸⁹⁵ *The Quarterly Anti-Slavery Magazine* 2:1 (1836), 89.

⁸⁹⁶ *The Quarterly Anti-Slavery Magazine* 2:7 (1837), 232.

⁸⁹⁷ *The Quarterly Anti-Slavery Magazine* 2:1 (1836), 79.

Columbia the text alone gave way to the intentions of the framers (albeit at times located in the text itself).

Conclusion

For the abolitionists, the focus on recapturing the intentions of the framers set them up for a staggering blow as Madison's papers revealed the framers' awareness of and complicity in the accommodations with slavery in the Constitution. By the 1840s the belief that the founding fathers had made no deal regarding slavery was difficult to maintain. Writing in 1844 on Madison's papers, Wendell Phillips would state, "our fathers bartered honesty for gain and became partners with tyrants that they might share in the profits of their tyranny."⁸⁹⁸ Disillusion would extend to its logical conclusion in Garrison's burning of the Constitution in 1854. Out with abolitionist circles, understandings of the Constitution that prized the text-as-adopted fell to the margins of political discussions, or remained locked in a judicial realm that increasingly looked to precedent for legitimacy. When these two realms did reconnect it would be in the ill-fated decision in *Dred Scott*. There logic of intention would course through a discussion of slavery and the Constitution, in which Chief Justice Taney's opinion that members of the "African race" could never be citizens of the United States was predicated on the belief that such an eventuality had never been intended by those involved in the Constitution's creation.⁸⁹⁹ As the nation trundled towards a Civil War that would see the Constitution textually revised in order to cast out doubts as to its meaning, it would be marginal figures that remained loyal to the notion

⁸⁹⁸ Phillips, *The Constitution A Pro-Slavery Compact*, 6.

⁸⁹⁹ *Scott v. Sandford* (60 U.S. 393)

of the framers as drafters and the people as authority. In 1854 Gerrit Smith echoed Archibald MacLaine and Edmund Pendleton in his opposition to the Nebraska Bill:

“Much stress is laid on the Intentions of the framers of the Constitution. But we are to make little more account of their intentions than of the intentions of the scrivener, who was employed to write the deed of the land. It is the intentions of the adopters of the Constitution, that we are to inquire after; and these we are to gather from the words of the Constitution, and not from the words of the framers – for it is the text of the Constitution, and not the talk of the Convention, that the people adopted.”⁹⁰⁰

But Smith would be thwarted in his attempts to stop the Bill and would leave Congress before completing a single term. By this point, those rejecting the logic of framer intention were arguing against the mainstream of abolitionism and the mainstream of society.

⁹⁰⁰ *Speech of Gerrit Smith, On the Nebraska Bill. In Congress, April 6, 1854*, (Washington, D.C.: Buell & Blanchard, 1854), 7.

Conclusion

This dissertation has traced developments in constitutional understanding through the period after the Philadelphia Convention until the debates surrounding slavery during the 1836 presidential election. In the process of this, two themes have emerged. The first is the increasing complexity of claims to constitutional authority. To this extent the dissertation makes an argument linked to, but not the same as, recent works that have emphasized the usurpation of people's original constitutional authority.⁹⁰¹ In place of such counter-revolutionary narratives however, the dissertation depicts a degree of fluidity in the competing claims to authority that belies a straight-forward transfer from the masses and to the elites. Between 1789 and 1836, the competing claims of the people and the framers would intertwine with questions of what constitutional authority actually meant, bringing understandings of institutional, textual, and spiritual authority into conversation and conflict. Thus at different moments, different constellations of answers attached themselves to the banners of "the Constitution," producing a dynamic debate that was more complex than the people versus the elite. Even in the elite realm of judicial activity, declarations of the people's originary authority would be offered, albeit at times aimed at providing a mechanism by which to both curtail the *current* people's claim over the Constitution and to legitimize the Supreme Court's proclaimed authority with regard to constitutional matters. Although interrupted by the infamous *Dred Scott* decision, this judicial understanding would endure in some respects until the case of *Cooper v. Aaron* in 1958. On the other hand, the second theme is the very participation of the people, in the sense of the less-elite participants in the public discourse, in the complex development of constitutional authority. As

⁹⁰¹ For example, those by Holton, Kramer, and Bouton. Woody Holton, *Unruly Americans and the Origins of the Constitution*, (New York: Hill and Wang, 2007); Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review*, (Oxford: Oxford University Press, 2004); Terry Bouton, *Taming Democracy: "The People," The Founders, and the Troubled Ending of the American Revolution*, (Oxford: Oxford University Press, 2007).

evinced in the printed debates in 1790-91, 1800-01, 1810-11, and 1819-20, the toasts reviewed between the period 1810 and 1835, and the abolitionist pamphlets of the 1830s, the period saw a concession of constitutional authority by the white, male participants within the public sphere to the ever receding first generation of founders. Receding both in the sense that the first generation was departing for the “Elysian fields,”⁹⁰² but also to the degree that the generation was being reduced to the actors present in Philadelphia in 1787. The concept of the “framers,” first articulated within the theatre of the Ratification debates and intended only for their duration, would be increasingly taken to heart as the early Republic developed.

The discussion has lead up to a point in the mid-1830s in which ideas of framer intent had sunk deep roots in the field of constitutional interpretation. Aside from the judicial realm, which was marginalizing the people in a different way, by the 1830s debates over the meaning of the Constitution were becoming debates over the intentions of the framers. Particularly with regard to the issue of slavery, this framework left political actors with a choice of rejecting the Constitution or conceding its existence as a check upon progressive politics. In this conclusion, I turn attention to Frederick Douglass’s own transition from an advocate of framer intention to a critic of that mode of constitutional interpretation in order to explore how a constitutional politics might be developed which breaks free of the constraints of intention. While advocates of framer intent are thin on the ground in the United States today, the influence of this way of thinking remains potent in conservative and progressive responses since its return to the fore in the 1980s. The early Twenty-first century remains in need of a constitutional politics that escapes the looming shadow of the drafters and their generation.

⁹⁰² Fourth of July toast at Vauxhall Gardens, 1826. *Baltimore Patriot*, July 8th, 1826.

As noted above, the publication of Madison's notes from the Philadelphia Convention made arguments for the framers' anti-slavery intent in the constitutional document difficult. In light of this, figures who continued to reject a pro-slavery reading of the Constitution (including Samuel J. May and Gerrit Smith) sought to make arguments about the Constitution that did not rely upon the framers themselves. Such arguments developed on the basis of two considerations. The first, suggested by the speech of Gerrit Smith quoted in the last chapter, pointed to the constitutional text's lack of express provision for slavery in order to argue that there was no literal basis for deeming the institution of slavery constitutional. The second was typified in Lysander Spooner's *The Unconstitutionality of Slavery* (1847), where he developed a Blackstonian argument that as nothing immoral could be sanctioned by legitimate law, it was not logically possible for the Constitution to be a pro-slavery document.⁹⁰³ Reasoning from the position that all constitutions emerged from consent and so could not extend beyond the powers "rightfully" delegated, Spooner claimed "*that constitutional law, under any form of government, consists only of those principles of the written constitution, that are consistent with natural law, and man's natural rights.*"⁹⁰⁴ Constitutions ought, therefore, to be "construed *strictly*" in favor of natural right.⁹⁰⁵ Whether appealing directly to the text or to a more abstract conception of the social contract, abolitionists in this vein turned away from the framers in order to make their case.

⁹⁰³ Lysander Spooner, *The Unconstitutionality of Slavery: Including Parts First and Second*, (Bela Marsh: Boston, 1847).

⁹⁰⁴ Spooner, *The Unconstitutionality of Slavery*, 14.

⁹⁰⁵ Spooner, *The Unconstitutionality of Slavery*, 17-18.

However, such arguments were limited in their appeal. The New York circle around Gerrit Smith was squeezed between a Garrisonian abolitionist movement for whom the Constitution was morally corrupt and a Liberty Party increasingly willing to forego immediate abolition in favor of a wider political coalition.⁹⁰⁶ Alvan Stewart, a member of Smith's circle, could author "The Creed of the Liberty Party Abolitionists"⁹⁰⁷ in 1844, stating that:

"We believe, the Constitution of the United States, if properly and truly interpreted, is a great and glorious anti-slavery Constitution, for the protection of all; and was not made for the destruction of one-sixth of our people."⁹⁰⁸

But by 1848 the circle's "Liberty League" was formed in an attempt to regain control of a Liberty Party which was openly mocked by Garrisonians as having the "good sense to make no claim of an Anti-Slavery construction" of the Constitution lest it demonstrate "a collision of sentiment with their candidate."⁹⁰⁹ Nominating John P. Hale, a Democrat who had served under Jackson as Attorney General, as its candidate, the 1848 Liberty Party had eluded internal disagreement with a carefully worded platform that fell short of declaring slavery unconstitutional. The resolutions of the nominating convention committed the party to the idea that "the Constitution imposes no obligation upon the people to sustain or countenance slavery" and the "Government has no power to create, extend, or foster domestic slavery," while suggesting they had "no time to waste in discussing the nice points of the Constitution."⁹¹⁰ Before the election took place, Hale withdrew and the Liberty Party dissolved, with some of its members drifting into the Free Soil party that nominated Van Buren. The Liberty League ran

⁹⁰⁶ Lawrence J. Friedman, "The Gerrit Smith Circle: Abolitionism in the Burned-Over District," *Civil War History* 26 (1) 1980.

⁹⁰⁷ *The Creed of the Liberty Party Abolitionists; Or, their Position Defined, in the Summer of 1844, as understood by Alvan Stewart*, (Jackson & Chaplin, 1844).

⁹⁰⁸ *Creed of the Liberty Party Abolitionists*, 2.

⁹⁰⁹ *Sixteenth Annual Report, Presented to the Massachusetts Anti-Slavery Society, By its Board of Managers, January 26, 1848*, (Andrew & Prentiss: Boston, 1848), 61.

⁹¹⁰ *Massachusetts Liberty Convention and Speech of Hon. John P. Hale, Together with his Letter Accepting his Nomination for the Presidency* (1848).

Gerrit Smith as a rival presidential National Liberty candidate, but he received less than a tenth of a percent of the popular vote and matched only one in a hundred of the Free Soil votes.

Despite his weak electoral showing, Gerrit Smith's vision of the Constitution has become historically significant — and instructive for modern constitutional interpretation — insofar as he would influence Frederick Douglass's attitude towards the Constitution. The development of Douglass's view of constitutional interpretation can be seen through comparison between two lengthy considerations of the Constitution and slavery at either side of the 1850s. In 1849, the *North Star* published an article "The Constitution and Slavery" and in 1860 Douglass would address a Glasgow audience on the topic of "The Constitution of the United States: Is it Pro-slavery or Anti-slavery?" Comparison of these pieces depicts radically different understandings of the Constitution's relationship with slavery, but also starkly different modes of interpretation. In 1849, Douglass espoused an understanding of the Constitution firmly grounded in the intention of the framers. By 1860 he would argue that the text ought to be interpreted absent any reference to their intent. His own reflections upon this transformation provide both a measure of how deeply ingrained the assumption of framer intent was, and an indication of how Douglass, at least, incrementally moved from one position to the other.

The short 1849 essay, "The Constitution and Slavery," rejects the notion, put forth by Gerrit Smith and others, that the Constitution ought to be understood without reference to the framers.⁹¹¹ Thundering that, "The Constitution is not abstraction," Douglass suggested that it was "a living, breathing fact," and as such ought to be engaged within the framework of its actual

⁹¹¹ Frederick Douglass, "The Constitution and Slavery," in *The Life and Writings of Frederick Douglass: Volume I*, edited by Philip S. Foner, (International Publishers: New York, 1950).

influence upon society and the nature of its creation.⁹¹² In language that mirrored, but then reversed, Pendleton's demand during the ratification that delegates and voters ought treat the Constitution as though it had "dropped from one of the planets,"⁹¹³ Douglass argued that

"Had the Constitution dropped down from the blue overhanging sky, upon a land uncursed by slavery, and without an interpreter... no one would have imagined that it recognized or sanctioned slavery. *But having a terrestrial, and not a celestial origin*, we find no difficulty in ascertaining its meaning in all parts which we allege to relate to slavery."⁹¹⁴

The context in which the Constitution was drawn up could not be overlooked when attempting to understand the document. "Slavery existed before the Constitution, in the very States by whom it was made and adopted. — Slaveholders took a large share in making it."⁹¹⁵ Citing Pinckney's demand at the Philadelphia Convention that the right to import slaves be untouched, Douglass argued that the "parties that made the Constitution, aimed to cheat and defraud the slave, who was not himself a party to the compact or agreement. It was entered into understandingly on both sides."⁹¹⁶ A "most cunningly-devised and wicked compact," Douglass could not bring himself, or encourage his readers to, support anything short of its "complete overthrow."⁹¹⁷ In 1849 then, Douglass was willing to espouse a view that the Constitution could only be truly understood with regard to the intentions of the Philadelphia Convention.

Douglass's move away from this position over the next decade is instructive in terms of depicting a constitutional discourse firmly grounded in framer intention and the obstacles presented by a move beyond such a discourse. Even around the time Douglass wrote "The

⁹¹² Douglass, "The Constitution and Slavery," PP.

⁹¹³ *The Debates in the several State Conventions on the adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787... Volume III*, edited by Jonathan Elliot, (New York: Burt Franklin, 1968), 38.

⁹¹⁴ Douglass, "The Constitution and Slavery," PP. Emphasis added.

⁹¹⁵ Douglass, "The Constitution and Slavery," PP.

⁹¹⁶ Douglass, "The Constitution and Slavery," PP.

⁹¹⁷ Douglass, "The Constitution and Slavery," PP.

Constitution and Slavery,” his correspondence was evincing a weakening commitment to that position.⁹¹⁸ Writing to his “Dear Friend” Gerrit Smith at the beginning of 1851, Douglass admitted that “I have thought much since my personal acquaintance with you and since hearing your reasons for regarding the Constitution of the United States an Anti-Slavery instrument.”⁹¹⁹ While he could “not yet see that instrument in the same light” as Smith, Douglass was “sick and tired of arguing on the slaveholders’ side of this question.”⁹²⁰ The slaveholders were “doubtless right so far as the intentions of the framers of the Constitution are concerned,” so the central question for Douglass was whether it is “good morality to take advantage of a legal flaw and put a meaning upon a legal instrument the very opposite of what we have good reason to believe was the intention of the men who framed it?”⁹²¹ It is striking that Douglass in 1851 would frame this as a moral question.⁹²² The next sentences in the letter display the degree to which such an assumption had come to undergird *American* constitutional politics; “I know well enough that slavery is an outrage, contrary to all ideas of justice, and therefore cannot be law according to Blackstone. But may it not be law according to American legal authority?”⁹²³ Douglass’s hesitation is not due to Spooner’s denial of unjust law’s legitimacy but Smith’s rejection of the hold of intention over textual meaning.

Later that year the *North Star* would publicly state its — and by extension Douglass’s — reasons for breaking with the Garrisonian notion of the Constitution as a pro-slavery document.

⁹¹⁸ Indeed, “The Constitutionality of Slavery” was itself written in response to accusations that he had adopted Smith’s position. *The North Star*, March 16th, 1849.

⁹¹⁹ Frederick Douglass, “To Gerrit Smith, Esqr. Rochester, Jan. 21st, 1851,” in *The Life and Writings of Frederick Douglass: Volume II Pre-Civil War Decade 1850-1860*, edited by Philip S. Foner, (International Publishers: New York, 1950), 149.

⁹²⁰ Douglass, “To Gerrit Smith, Esqr. Rochester, Jan. 21st, 1851,” 149.

⁹²¹ Douglass, “To Gerrit Smith, Esqr. Rochester, Jan. 21st, 1851,” 150.

⁹²² As a milestone in the development of the idea of authorship, it also reflects an attitude in which the observation of authorial intent is not a question of social practicality but rather moral obligation.

⁹²³ Douglass, “To Gerrit Smith, Esqr. Rochester, Jan. 21st, 1851,” 150.

Stating that the change had not “been hastily arrived at,” the paper asserted “the firm conviction that the Constitution, construed in the light of well established rules of legal interpretation, might be made consistent in its details with the noble purposes avowed in its preamble.”⁹²⁴ In detailing its disillusionment with its former position, the paper provided, and repudiated, a concise account of constitutional interpretation via intention:

“We found, in our former position, that, when debating the question, we were compelled to go behind the letter of Constitution, and to seek its meaning in the history and practice of the nation under it — a process always attended with disadvantages; and certainly we feel little inclination to shoulder disadvantages of any kind, in order to give slavery the slightest protection.”⁹²⁵

In a letter to Smith around the same time, Douglass spelt out once again that it was the rejection of the authority of the framers that had held back his conversion:

“You can prove that even in the *North Star* more than two years ago, I gave up the ground that the Constitution, when strictly construed, is a pro-slavery document, and that the only points which prevented me from declaring at that time in favor of voting and against the disunion ground related to the intentions of the framers of the Constitution.”⁹²⁶

Moreover, even his rejection of the former position was not a complete abandonment of the idea of framer intention, but rather a shift to a more textually defined intent. In the same letter, Douglass relayed his conversion thus; “I had not made up my mind then, as I have now, that I am only in reason and in conscience bound to learn the intentions of those who framed the

⁹²⁴ Frederick Douglass, “Change of Opinion Announced,” in *The Life and Writings of Frederick Douglass: Volume II Pre-Civil War Decade 1850-1860*, edited by Philip S. Foner, (International Publishers: New York, 1950), 155.

⁹²⁵ Douglass, “Change of Opinion Announced,” 156.

⁹²⁶ Frederick Douglass, “To Gerrit Smith, Esqr. Rochester, May 21st, 1851,” in *The Life and Writings of Frederick Douglass: Volume II Pre-Civil War Decade 1850-1860*, edited by Philip S. Foner, (International Publishers: New York, 1950), 157.

Constitution *in the Constitution itself*.⁹²⁷ The text was authoritative, but as record of intent, not apart from it.

A year later, in “The Meaning of July Fourth for the Negro,” he would display a similar conception of the Constitution in asking “if it be not somewhat singular, that, if the Constitution were intended to be, by its framers and adopters, a slaveholding instrument why neither slavery, slaveholding, nor slave can anywhere be found in it.”⁹²⁸ However, if “The Meaning of July Fourth for the Negro” nodded towards the idea of the text-as-intent, it also signaled the manner in which Douglass would ultimately move beyond intent. In asking his question in that speech, Douglass also laid out the manner in which he hoped it would be answered. He held “that every American citizen has a right to form an opinion of the constitution, and to propagate that opinion, and to use all honorable means to make his opinion the prevailing one.”⁹²⁹ Despite an apparent commitment to the idea that it was the framers’ — as authors — intention as expressed in the text that should guide interpretation, Douglass was willing to state that any individual’s “plain reading” in this sense was as valid as any other’s.

It is in response to the Dred Scott decisions that the next stage of Douglass’s evolution can be observed. In “The Dred Scott Decision,” a speech given in New York in 1857, Douglass would discuss another manner in which the Constitution was the American people’s document. Beginning to flesh out the ideas that would take full form in his 1860 Glasgow speech, Douglass noted that “Slavery lives in this country not because of any paper Constitution, but in the moral blindness of the American people, who persuade themselves that they are safe, though the rights

⁹²⁷ Douglass, “To Gerrit Smith, Esqr. Rochester, May 21st, 1851,” 157.

⁹²⁸ Frederick Douglass, “The Meaning of July Fourth for the Negro,” in *The Life and Writings of Frederick Douglass: Volume II Pre-Civil War Decade 1850-1860*, edited by Philip S. Foner, (International Publishers: New York, 1950), 202.

⁹²⁹ Douglass, “The Meaning of July Fourth for the Negro,” 202.

of others may be struck down.”⁹³⁰ Making a corresponding distinction between the “Constitution... and its administration,” he pointed to the possibility of a gap between the commitments of the text and the practices and policies pursued while claiming its authority. Douglass argued that when judging the character of the Constitution we should be careful not to “condemn the good law with the wicked practice,” to recognize that the actions taken in the name of Constitution are not identical to the Constitution itself.⁹³¹ Finding such a gap between law and practice, and between the paper Constitution and the morality of the American people, Douglass could both condemn slavery as unconstitutional and look to the Constitution as the basis for America’s moral renewal. In allowing the gap between the written Constitution and practice, the “American people ha[d] made void our Constitution.”⁹³² But in Douglass’s argument the potential for constitutional rehabilitation also lay with the people. Both the ultimate interpreters of the Constitution and its administrators, they have the capacity to overcome the gap between the paper Constitution and their moral blindness. And mechanism for achieving this lay in the rejection of the constitutional interpretations of Garrison on one hand and Chief Justice Taney on the other, both of whom reasoned by way of framer intent; “...by showing that the Constitution does not mean what it says, and says what it does not mean, by assuming that the written Constitution is to be interpreted in the light of a secret and unwritten understanding of its framers... They do not point us to the Constitution itself... but they delight in supposed

⁹³⁰ Frederick Douglass, “The Dred Scott Decision,” in *The Life and Writings of Frederick Douglass: Volume II Pre-Civil War Decade 1850-1860*, edited by Philip S. Foner, (International Publishers: New York, 1950), 416.

⁹³¹ Douglass, “The Dred Scott Decision,” 423.

⁹³² Douglass, “The Dred Scott Decision,” 424.

intentions — intentions nowhere expressed in the Constitution, and everywhere contradicted in the Constitution.”⁹³³

Douglass’s speech in Glasgow in the Spring of 1860, “The Constitution of the United States: Is it Pro-slavery or Anti-slavery?” was the culmination of this decade of constitutional consideration.⁹³⁴ Beginning with a reiteration of the distinction between the Constitution and its application, Douglass stated that if “the Government has been governed by mean, sordid, and wicked passions, it does not follow that the Constitution is mean, sordid, and wicked.”⁹³⁵ He then repeated the two central claims of “The Dred Scott Decision;” That laws should be judged on their content and not their practice, and that the Constitution should be understood only as the text, not the “secret intentions of individuals who may have had something to do with writing the paper.”⁹³⁶ The laws of America “are one thing, her practice is another,” claimed Douglass.⁹³⁷ “Shall we condemn the righteous law because wicked men twist it to the support of wickedness?”⁹³⁸ To do so would be to grant to slaveholders the argument that the Constitution shelters their actions. “Shall we... hand over to slavery all that slavery may claim on the score of long practice?”⁹³⁹ Instead Douglass committed himself to “the mere text, and only the text, and not any commentaries or creeds written by those who wished to give the text a meaning apart from its plain meaning.”⁹⁴⁰ That was, after all, what had been adopted by the people. Reminding his audience that the Philadelphia Convention had sat with closed doors, and that the notes of

⁹³³ Douglass, “The Dred Scott Decision,” 420.

⁹³⁴ Frederick Douglass, “The Constitution of the United States: Is it Pro-slavery or Anti-slavery?” in *The Life and Writings of Frederick Douglass: Volume II Pre-Civil War Decade 1850-1860*, edited by Philip S. Foner, (International Publishers: New York, 1950)

⁹³⁵ Douglass, “The Constitution of the United States: Is it Pro-slavery or Anti-slavery?” 467.

⁹³⁶ “The Constitution of the United States: Is it Pro-slavery or Anti-slavery?” 469.

⁹³⁷ “The Constitution of the United States: Is it Pro-slavery or Anti-slavery?” 470.

⁹³⁸ “The Constitution of the United States: Is it Pro-slavery or Anti-slavery?” 470.

⁹³⁹ “The Constitution of the United States: Is it Pro-slavery or Anti-slavery?” 470.

⁹⁴⁰ “The Constitution of the United States: Is it Pro-slavery or Anti-slavery?” 469.

those discussions were not published until well after the Constitution's adoption, Douglass asked "What will the people of America a hundred years hence care about the intentions of the scribes who wrote the Constitution?"⁹⁴¹ Seemingly the text is no longer regarded as a record of intent but a text adopted by the people. The correspondence of text and framer intent when it occurs is coincidental, not the valuation of the constitutional document - "It should also be borne in mind that the intentions of those who framed the Constitution... are to be respected so far, and so far only, as we find those intentions plainly stated in the Constitution."⁹⁴² After all, the drafters "were for a generation, but the Constitution is for ages."⁹⁴³

Detailing at length the neutrality of the Constitution's textual provisions with regard to the ability to end slavery, Douglass conceded that the practice of the Constitution had been to enable slavery. Once again he turned to the American people as the party responsible for this. "But to all this it is said that the practice of the American people is against my view. I admit it. They have committed innumerable wrongs against the Negro in the name of the Constitution."⁹⁴⁴ But he also reiterated that it was within the power of the people to reverse this practice. Douglass avowed the correctness of the slaveholders' critical insight that "if there is once a will in the people of America to abolish slavery, there is no word, no syllable in the Constitution to forbid that result."⁹⁴⁵ The administration of the Constitution could fulfill its promise: "If the South has made the Constitution bend to the purposes of slavery, let the North now make that instrument bend to the cause of freedom and justice."⁹⁴⁶

⁹⁴¹ "The Constitution of the United States: Is it Pro-slavery or Anti-slavery?" 469.

⁹⁴² "The Constitution of the United States: Is it Pro-slavery or Anti-slavery?" 469.

⁹⁴³ "The Constitution of the United States: Is it Pro-slavery or Anti-slavery?" 469.

⁹⁴⁴ "The Constitution of the United States: Is it Pro-slavery or Anti-slavery?" 478.

⁹⁴⁵ "The Constitution of the United States: Is it Pro-slavery or Anti-slavery?" 479.

⁹⁴⁶ "The Constitution of the United States: Is it Pro-slavery or Anti-slavery?" 480.

In Glasgow, Douglass pushed his argument to the point of confrontation with the idea of framer intent. The divisions between government and the Constitution, between law and its practice gave him the materials with which to claim that slavery was not merely a drift from the aims of the Constitution as set out in the Preamble but an attempt to contort the Constitution itself. He highlighted the truth that framer intent was itself a *practice* – an active reading which was tantamount to a specific administration of the Constitution that had the result of changing good law into wicked practice. It was not that advocates of a pro-slavery Constitution merely went beyond the text, but that they actively read back into the text a reading taken from outside it. In doing so they gave Douglass “a powerful argument on my side,” but they also indicated that framer intention and practice were two forms of the same action, two ways to move outside the text in order to press a meaning upon it.⁹⁴⁷ Douglass highlighted the active nature of this reading by comparing his own conduct with that of his immediate adversary:

“He pretended to be giving chapter and verse, section and clause, paragraph and provision. The words of the Constitution were before him. Why then did he not give you the plain words of the Constitution?... These are the words of that orator, and not the words of the Constitution of the United States. Now you shall see a slight difference between my manner of treating this subject and that which my opponent has seen fit, for reasons satisfactory to himself, to pursue. What he withheld, that I will spread before you: what he suppressed, I will bring to light: and what he passed over in silence, I will proclaim: that you may have the whole case before you, and not be left to depend upon either his, or upon my inferences or testimony.”⁹⁴⁸

The speaker at the City Hall had, Douglass noted, been required to insert text into his accounts of the Constitution’s clauses to produce a pro-slavery reading. As the people had chosen not to enact an anti-slavery administration of the Constitution, so had the speaker chosen to adopt a pro-slavery reading of the Constitution. And as the people could opt to alter their practice of

⁹⁴⁷ “The Constitution of the United States: Is it Pro-slavery or Anti-slavery?” 470.

⁹⁴⁸ “The Constitution of the United States: Is it Pro-slavery or Anti-slavery?” 471.

administration, so too could the people choose to reject the external support of framer intent and commit to a constitutional understanding that looked only to the text.

A Constitution of the Present

Douglass's identification of the people's complicity in their own loss of authority to the framers presents a diverse set of considerations. The arguably most important of these is a reflection upon assumptions regarding relationship between popular authority and democracy. The "people" in early Republic were participants both in the exclusion of voices critical of the Constitution and its creation from the public debate, and in the surrender of their own authority to the previous generation. The white abolitionists of the 1830s, holding perhaps the most inclusive view of the "people" within the set of legitimized participants in the electoral-institutional political community, would ultimately be some of the most committed advocates of the view that the Constitution's correct understanding was that of the framers'. Challenges to the constituted membership of the "people" would come, as Jason Frank has shown, from those at the edges of that definition.⁹⁴⁹ Those firmly within that definition were active in an ideological project that worked to forego the power of "people" that marginal groups sought access to. Popular authority here worked to undermine democracy. The framers' authority was given to them, not taken by them and the legitimized people were agents within, and not merely victims of, this process. In a contemporary United States, marked by elected branches of government which pass and defend policies which act as checks upon the expansion of the franchise and exclude minorities from full legal protections, the assumption that returning the Constitution to

⁹⁴⁹ Jason Frank, *Constituent Moments: Enacting the People in Postrevolutionary America*, (Durham: Duke University Press, 2010).

the people would result in a more democratic society perhaps ought to be subject to further scrutiny. And yet, Douglass's theorization of the Constitution in 1860 suggests that the people's relationship with the constitutional document need not be one that results in stagnation or even decline of a democratic society. Douglass shows us that "framer intent" is a choice, not an obligation.

To a degree, recent developments within constitutional theory underline Douglass's claim. Over the last few decades, constitutional theory has seen a movement away from the idea that framer intent is a legitimate method by which to interpret the Constitution. Since the forceful articulation of framer intent by Edwin Meese in the 1980s, conservatives in particular (but also some liberals) have shifted to the ground of "original meaning" as a basis for a timeless, albeit 1787-88 focused, interpretation of the Constitution. They look not to the intentions of the members of the Philadelphia Convention, but rather the understanding of the society that pledged itself to the Constitution during Ratification. Grounding their arguments on the ideal of popular sovereignty, advocates of original meaning comprehend the Founding as a moment of popular assent to a textual constraint on government. For the rule of the people to have meaning, advocates of original meaning assert, the text that the people of 1787-88 assented to should remain controlling until such time as another constitution receives popular assent.⁹⁵⁰ The move between framer intent and original meaning is itself indicative of the manner in which *the*

⁹⁵⁰ For the most rigorous articulation of this argument see Whittington. For the practical application of these ideas see Scalia. Keith, E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review*. (Lawrence, KS: University Press of Kansas, 1999); Antonin Scalia, "Originalism: The Lesser Evil." *University of Cincinnati Law Review* 57.

legitimate mode of constitutional interpretation⁹⁵¹ can be altered as society reassesses its assumptions about the nature of the Constitution's authority.

But the move to original meaning is not a shift away from a focus upon 1787-88. Original meaning still involves the "temporal imperialism" that Anne Norton identified in framer intent by which a group exerts its authority across time.⁹⁵² It merely replaces the group of elite framers with a whole generation - and to the extent that it still provides a basis for restricting policies that envision an expansive democratic community, it represents another Douglassian choice to forego the full democratic potential of the Constitution. Original meaning, in the final analysis, still adheres to the logic of "intention" as outlined by Sheldon Wolin twenty years ago - the desire to enforce an order on to the future, to project a rationality on to the world, and to seek to manage the political threats to that order - and identifies the intention as that of people in 1787-88.⁹⁵³

The degree to which some progressive opponents of conservative supporters of original meaning have embraced its tenets is indicative of the manner in which this broader sense of intention has come to be identified with democracy in American constitutional discussions. Jack M. Balkan's *Living Originalism* represents one such attempt to accept the principle that the commitments of the generation of 1787-88 should be the basis of contemporary constitutional discussions.⁹⁵⁴ Depicting original meaning ("original expected application" in Balkan's wording) as a form of "skyscraper originalism," Balkan rejects its surrender of political agency to the

⁹⁵¹ Of course, framer intent was only ever *the* legitimate mode of constitutional interpretation for its adherents. Others pledged their allegiance to different modes of constitutional interpretation. Likewise, original meaning is the *only* choice only for its advocates.

⁹⁵² Anne Norton, "Transubstantiation: The Dialectic of Constitutional Authority", *The University of Chicago Law Review* 55 (2) 1988.

⁹⁵³ Sheldon S. Wolin, "Tending and Intending a Constitution: Bicentennial Misgivings," In *The Presence of the Past: Essays on the State and the Constitution*, Sheldon S. Wolin, (Baltimore, MD: The Johns Hopkins University Press, 1989).

⁹⁵⁴ Jack M. Balkan, *Living Originalism*, (Harvard: The Belknap Press of Harvard University Press, 2011).

values of 1787. Instead, Balkan offers “framework originalism” as an alternative. Framework originalism accepts the “text and principle” of the Constitution as a basis from which to draw out and develop a modern liberal democratic constitutional order. However, Balkan’s view of the superiority of his approach to, for example, Dworkin’s “Living Constitution,” resides in the manner in which Living Originalism positions the contemporary people as the inheritors of a constitutional project initiated by the drafters of 1787. At its heart, Living Originalism is a doctrine of “fidelity” to Constitution written over two hundred years ago. For Balkan, the role of the present generation is to add *their* intention to the one they inherited:

“In every generation, We the People of the United States make the Constitution our own by calling upon its text and its principles and arguing about what they mean in our own time. That is how each generation connects its values to the commitments of the past and carries forward the constitutional project of the American people into the future.”⁹⁵⁵

Each generation reworks the cumulative “intentions” of previous generations, and passes it on to the next. Breaking with original meaning and framer intention in allowing for constitutional agency in the current generation, living originalism nevertheless understands that agency in terms of attempting to bind the future to the newly reconfigured constitutional order. The intentions of 1787-88, be they framer or generational in scope, are replaced with the intentions of 1787-2013. The past is still ultimately a bind on the future.

The path away from the debates of the 1980s over framer intent is not one that travels through original meaning, but rather one in which we move to no longer interpret but rather to contest. It consists in a willingness to forego intention and instead seek a constitutional politics grounded in attempts to problematize the present in place of controlling the future (or past). It requires the willingness of the people to *choose* a constitutional politics for themselves. In

⁹⁵⁵ Balkan, *Living Originalism*, 11.

contrast to Balkan, Wolin's own response to "intention" was a politics of "tending." By this, he held up the hope of politics that was motivated not by the suppression of an organic society in the name of rationality, but rather the cultivation of democratic counterpoints to "normal" politics. Seeing the politics of "tendance" in the protest politics of the 1960s and the ecological, feminist, sexual, and civil rights politics that followed that decade, Wolin looked optimistically to the stubborn persistence of tending as an alternative to intention.⁹⁵⁶ Although the politics of tendance contain within them an effort to value the past (Wolin describes tending as possessing "a concern for the historicity of things,"⁹⁵⁷ in opposition to intention's concern for the future), the effect is a conscious attempt to resist the authority of intentions. It is a rejection of the authority of "beginnings" and recognition of the political world as it exists, organic, contingent, and contestable. It is, perhaps in spite of Wolin's claims, a politics of the present in both senses of the phrase (extant and current) concerned with the here and now. This attention to the present, holds echoes of Douglass's view of the Constitution as a decontextualized text, in existence but subject to the will of the present generation. For Douglass, the constitutional document was not beholden to the conditions of its creation, but it was nonetheless an extant, if neutral, text. The Douglassian text is available to be "bent" in the direction of justice by the people. Here Douglass offers a way to break free from the intentions of history without abandoning the very real existence of the Constitution. In Wolin's terms, we can participate in a constitutional politics of tending: of treating the Constitution as extant institution within American politics, but one subject to contestation, problematization, and ultimately to be put to the service of the living. In contrast to Balkan, we can recognize the Constitution without committing ourselves to the teleological project begun by the drafters. To ignore the Constitution's place within the politics

⁹⁵⁶ Wolin, "Tending and Intending a Constitution," 99.

⁹⁵⁷ Wolin, "Tending and Intending a Constitution," 90.

of the United States would be denial. To sacrifice democracy to its historic claim of popular consent would be folly.

Appendix: A note on the use of newspapers

The use of newspapers as the arena of inquiry for much of this dissertation builds on the recent work of historians, such as Jeffrey L. Pasley⁹⁵⁸ and Marcus Daniel,⁹⁵⁹ which has challenged prevailing attitudes towards this period. The overwhelming preponderance of inquiry into constitutional interpretation during this time has focused on the debates within Congress, the opinions of the federal courts and the letters of great men.⁹⁶⁰ Newspapers as a major source for systematic research into constitutional understandings have been largely overlooked, possibly due in no small part to the characterization of the early Nineteenth-Century as the “Dark Ages” of American journalism, by Frank Luther Mott in his influential history of the newspapers of the United States.⁹⁶¹ His assertion that in the period 1801-1833 “[f]ew papers were ably edited; they reflected the crassness of the American society of the times. Scurrility, assaults, corruption, blatancy were commonplace” meshed with contemporary testimony such as Jefferson’s despairing claim during the period that “[n]othing can now be believed which is seen in a

⁹⁵⁸ Jeffrey L. Pasley, *"The Tyranny of Printers": Newspaper Politics in the Early American Republic* (Charlottesville: University Press of Virginia, 2001).

⁹⁵⁹ Marcus Daniel, *Scandal & Civility: Journalism and the Birth of American Democracy* (Oxford: Oxford University Press, 2009).

⁹⁶⁰ For examples of this approach cf. Joseph M. Lynch, *Negotiating the Constitution: The Earliest Debates over Original Intent* (Ithaca NY: Cornell University Press, 1999); H. Jefferson Powell, “The Original Understanding of Original Intent,” *Harvard Law Review* 98 (5): 885-948; Charles A. Lofgren, “The Original Understanding of Original Intent?,” in *Interpreting the Constitution: The Debate over Original Intent*, 117-150 (Boston: Northeastern University Press, 1990). Kammen’s *The Origins of the American Constitution*, though focusing on a slightly earlier period, provides a typical scholarly approach to the Constitution. With several minor exceptions the documentary reader is entirely composed of extracts from *The Federalist Papers*, private correspondence of the founders (of which none is not sent or received by Washington, Adams, Jefferson, Madison or Hamilton – and overwhelming it is the case that it was sent by these figures), and official records. Michael Kammen, *The Origins of the American Constitution: A Documentary History* (New York: Penguin Books, 1986).

⁹⁶¹ Frank Luther Mott, *American Journalism: A History: 1690-1960* (New York: The Macmillan Company, 1962).

newspaper”⁹⁶² and worked to place newspapers beyond the scope of “top-down” studies of constitutional interpretation.⁹⁶³ This attitude has now come under attack from two distinct, but interrelated, positions. Firstly, the weaknesses borne of attempting to narrate a history of journalism separated from its social and cultural context has been pointed out by John C. Nerone. In reviewing the flaws of this approach, he highlights the importance of recognizing that:

“rather than being a thing unto itself, a medium is exactly what the word suggests: something in between other things... The history of the media cannot be understood apart from the history of the social and cultural contexts within which media developments occurred.”⁹⁶⁴

That is to say, that the nature of newspapers at this time is best understood as a reflection of their cultural context – and to reverse this logic their nature cannot justify their removal from any attempt to comprehend the cultural understandings of the time.

The second challenge to the exclusion of newspapers from the study of constitutional norms during this period comes as a consequence of the recent political histories that have highlighted the centrality of the presses to political life during this period. While histories of the newspaper in America have made much of the contribution of the presses to the success of the Revolution and the subsequent ratification of the Constitution, the 1790s has been characterized as an era of increasingly personal and scurrilous exchanges culminating in publications such as William Cobbett’s *Porcupine’s Gazette* (1797-99), whose very name signaled its intention to

⁹⁶² Thomas Jefferson, "To John Norvell, June 11th 1807," in *The Writings of Thomas Jefferson Memorial Edition*, by Andrew A. Lipscomb and Albert Ellery Bergh, (Washington D.C.: Thomas Jefferson memorial association of the United States, 1903-04), II 224.

⁹⁶³ John C. Nerone, “A Local History of the Early U.S. Press: Cincinnati, 1793-1848,” in *Ruthless Criticism: New Perspectives in U.S. Communication History*, 38-65 (Minneapolis: University of Minnesota Press, 1993).

⁹⁶⁴ Nerone, “A Local History of the Early U.S. Press,” 39.

needle its opponents.⁹⁶⁵ The crass nature of the presses led to the belief that they were of limited political importance, engaging only in polemic and personal attack and neglecting weighty political discussion.⁹⁶⁶ This position is problematic for two reasons. The first is the simplistic, but non-trivial, observation of Daniel that “scandal and incivility have always been a part of American politics.”⁹⁶⁷ As such newspapers in this period cannot be placed beyond the realm of constitutional research on account of their content. The second is that the nature of newspapers in this period is a consequence of the close connection that existed between partisan politics and newspaper editors. The very crudeness of the newspapers was a facet of their key position within the public sphere of early national America.

In attempting to characterize the public sphere within the early American republic, Brooke has observed that in this period conditions were present to both encourage the development of the public sphere and to require this development. Indeed for Brooke “the American Revolution was both consequence and cause of a widening domain of print and association: the public sphere.”⁹⁶⁸ What was striking in America was that;

“[b]y the 1830s, even in the 1770s, the United States was an amalgam of extremes possibly unique in human history; a bizarre spectrum of civil condition running from democracy to slavery.”⁹⁶⁹

⁹⁶⁵ Carol Sue Humphrey, *The Press of the Young Republic, 1783-1833*, (London: Greenwood Press, 1996); Mott, *American Journalism*, 129.

⁹⁶⁶ Daniel, *Scandal & Civility*, 6.

⁹⁶⁷ Daniel, *Scandal & Civility*, 5.

⁹⁶⁸ John L. Brooke, “Consent, Civil Society, and the Public Sphere in the Age of Revolution and the Early American Republic,” in *Beyond the Founders: New Approaches to the Political History of the Early American Republic*, ed. Jeffrey L. Pasley, Andrew W. Robertson, & David Waldstreicher, (Chapel Hill: The University of North Carolina Press, 2004), 223.

⁹⁶⁹ Brooke, “Consent, Civil Society, and the Public Sphere in the Age of Revolution and the Early American Republic,” 224.

Mapping onto this spectrum was a steep gradient in which successive groups participated within different deliberative environments and were expected to consent to the governmental structures through differing avenues. For Brooke:

“...fundamentally, this gradient of participation in civil life can be mapped onto a gradient of consent, from express to tacit, to alienated and withheld. Civil society, and particularly the play of deliberation and persuasion in the public sphere, was the site where the terms of consent and participation were negotiated and where the practices and outcomes of consent and participation, of citizenship, were enacted – and struggled over.”⁹⁷⁰

Crucial to this social ordering was the ability of those excluded from rational deliberation to engage in politics through persuasion – to operate within the public sphere in the form of printed exchange. Placing newspapers at the interface of the political and the public spheres gave newspaper editors a unique position as the medium through which the state and society corresponded. They would themselves become the linkage between the mass of those excluded from direct participation in political deliberation and the political elites who appealed to, and relied upon the consent of, those outside the institutions of governance.

Pasley’s account of the newspaper politics of the early national period highlights the manner in which the role of newspaper editor came to be characterized and institutionalized as the linkage between these two realms. As Pasley has noted, this period saw the transformation of newspaper editors into figures meeting Max Weber’s definition of professional politicians, insofar as they lived for and off of partisan work.⁹⁷¹ Pasley points to their unique position as individuals engaged in intellectual work while operating with the environment of artisans as an indication of their existence as a “new class” within post-colonial society.⁹⁷² This position saw

⁹⁷⁰ Brooke, “Consent, Civil Society, and the Public Sphere in the Age of Revolution and the Early American Republic,” 230.

⁹⁷¹ Pasley, “*Tyranny of the Printers*,” 15.

⁹⁷² Pasley, “*Tyranny of the Printers*,” 19.

editors and their newspapers come to operate as “the nodal points of the political system,”⁹⁷³ fulfilling many of the roles that political parties would carry out once institutionally established. As well as fulfilling the role of proto-party structures, they also took on the vital communicative role noted above. Moreover, the words of Benjamin Franklin Bache, whose *General Advertiser* (later the *Aurora*) would come to typify the political newspaper as partisan organ, show they were aware of the significance of this role:

“In a republic of which the public opinion is the basis, it [the press] is of very peculiar importance as the organ of that opinion, and in many cases, the only organ. There are many occurrences, properly within the sphere of public investigation, on which the people cannot express their sentiments by their representatives.”⁹⁷⁴

Newspapers were the conduits by which those operating within the political structures could survey public opinion, and through which they could communicate the “party line” on given issues. However, an arrangement making the newspapers and their editors prisms through which public opinion could be brought into focus, also gave these figures immense power over how the public came to form their own opinions, and how the latter saw the actions of those entrusted to represent them. When conscious of this power, editors such as Bache’s successor William Duane could become identifiable political actors in their own right – and moreover, they could and did shape public opinion in order to further their own political goals.⁹⁷⁵ Seeking to shape public opinion and positioned between those who participated directly in political deliberation within institutions and those who did so only indirectly from the outside, newspaper editors would be of neither world and of both, and their newspapers would reflect the mixture of deliberation and

⁹⁷³ Palsey, “*Tyranny of the Printers*,” 13.

⁹⁷⁴ Quoted in Pasley. “*Tyranny of the Printers*,” 85.

⁹⁷⁵ Duane would effectively take control of the Pennsylvanian Democratic movement in the 1805 and attempt to replace the Governor with his own favored choice. Elsewhere Matthew Lyon used his position as a newspaper editor to propel himself into Congress as the first ex-indentured servant. Pasley. “*Tyranny of the Printers*,” 189, 308-312, 109.

polemic that such a position entailed. Far from excluding newspapers and their editors from studies examining the process of forging public opinion regarding constitution interpretation, scholars would do well to recognize that the editors and those that contributed to print debate *were* the dominant agents in this process. As a consequence, any attempt to track the changing popular understandings of the Constitution during this period would do well to pay attention to newspaper debates.

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